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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GETTY OIL COMPANY,
Petitioner

v.

DEPARTMENT OF ENERGY, *et al.*,

AND

UNITED STATES OF AMERICA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

1. May an agency order imposing liability be sustained where the agency's proceeding was conducted: without disclosure by the agency of the *ex parte* submissions upon which it relied, without allowing discovery sought on material facts in dispute, with the burden of proof placed on the accused party, without any administrative law judge or independent finder of facts, without the requested adversarial hearing, without any rules of evidence or discovery, and without notifying the accused party that the period of the alleged price violation would be extended by 15 months?

2. May evidence qualify as substantial for the purpose of substantial evidence review where there was never any opportunity for adversarial testing of that evidence, either before the agency or in the District Court?

3. May prejudgment interest be awarded where the only regulation providing for prejudgment interest was adopted without compliance with applicable rulemaking requirements, and where the amount of the underlying claim was both uncertain and incalculable prior to judgment?

4. May the Department of Energy impose liability contrary to the plain meaning of an undefined term for the period before a prospective regulation mandating a different definition had been adopted?

PARTIES TO THE PROCEEDING

The Respondents are the Department of Energy; Donald P. Hodel, Secretary of Energy; George Brezney, Director, Office of Hearings and Appeals, Department of Energy; and the United States of America.

Petitioner Getty Oil Company's parent is Texaco Acquisitions Inc., which is in turn wholly-owned by Texaco Inc. Getty Oil Company has the following non-wholly-owned subsidiaries and affiliates: Manito Pipelines Ltd., Chemplex Company (Joint Venture), Chemplex Construction Corporation, Iricon Agency Ltd., Butte Pipe Line Company, Gibson Holdings, Ltd., Northern Tier Pipeline Company, Texoma Pipe Line Company, Wascona Pipe Line, Inc., Wascona Pipe Line, Ltd., Chase Transportation Company (Joint Venture), Chisholm Pipeline Company, MAGEC Finance Company (Partnership), Osage Pipe Line Company, Seminole Pipeline Company, Halbouty Alaska Oil Company, Chase Terminal Company (Joint Venture), Tide Water Oil Company (India), Ltd., Yong-Nam Chemical Company, Ltd.

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PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Petitioner Getty Oil Company respectfully prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the Temporary Emergency Court of Appeals of the United States entered in this action on October 5, 1984.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals of the United States, No. 3-37, is not yet reported but is reproduced at Appendix A. The decision of

the United States District Court for the District of Delaware, Civil Action No. 77-434, 569 F.Supp. 1204 (D.Del. 1983), is reproduced at Appendix B. The Decision and Order issued October 7, 1977, by the Department of Energy is reproduced at Appendix F.

JURISDICTION

The decision of the Temporary Emergency Court of Appeals was handed down on September 26, 1984, and judgment was entered on October 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976) and § 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 *note*, as incorporated in § 5 of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754 (1976).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." Sections 207(a) and 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 *note* (1976), appear at Appendix J. Section 754(a)(1) of the Emergency Petroleum Allocation Act of 1975, 15 U.S.C. § 754(a)(1) (1976) appears at Appendix K. Section 552(a)(1)(C) of the Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(c) (1976), appears at Appendix L. Relevant portions of Part 205, entitled "Administrative Procedures and Sanctions," of the Federal Energy Administration regulations in effect at the time of the crude oil transactions, 10 C.F.R. §§ 205.106, 205.108, and 205.172 (1977), appear at Appendix M. Section 205.196(a), entitled "Remedies," of the regulations of the Federal Energy Ad-

ministration as amended in 1975 and in effect at the time of the crude oil transactions, 10 C.F.R. § 205.195(a) (1977), appears at Appendix N. Relevant portions of Part 212, entitled "Mandatory Petroleum Price Regulations," of the Federal Energy Office in effect at the time of the crude oil transactions, 10 C.F.R. §§ 212.31, 212.73 (1977), appear at Appendix O. An interim amendment regarding exchanges adopted in 1978, 43 Fed. Reg. 59,810 (Dec. 21, 1978), appears at Appendix P.

STATEMENT OF THE CASE

This is an appeal by Getty Oil Company ("Getty") from an Opinion of the Temporary Emergency Court of Appeals ("TECA") modifying and affirming the decision of the United States District Court for the District of Delaware. The District Court sustained DOE's finding that Getty had violated Department of Energy ("DOE") producer price regulations by overcharging The Standard Oil Company (Ohio) ("Sohio") on sales of domestic crude oil and that the DOE had properly assessed prejudgment interest on such overcharges.

FACTUAL BACKGROUND

In May 1973, prior to the imposition of price controls, Getty and Sohio entered into three agreements:

(1) Sohio sold Getty its interest in Getty's oil-producing properties in a California oilfield.

(2) Getty agreed to sell Sohio specified volumes of various grades of domestic crude oil for cash, at prices which the contract provided could not exceed the posted prices.

(3) Sohio agreed to sell Getty equivalent volumes of two foreign crudes for cash at prices which re-

flected the then-prevailing differentials between those crudes and the domestic crude which Getty sold to Sohio pursuant to the domestic agreement. This agreement provided a price escalation mechanism which could allow the adjustment of prices to market values. This crude was resold by Getty in Japan and never entered the United States.

Each sale of crude oil was separately billed and separately paid for in full in cash, without any set-off or adjustment. Payment under the domestic agreement was due within ten days of receipt of invoice; payment under the foreign agreement was due in ninety days.

The sales of the domestic crude were *not conditioned* upon sales of the foreign crude. The termination provisions were not symmetrical between the two crude oil sales agreements. The two sales contracts involved different types of oil, different gravities, different sulphur contents, different prices, different countries of origin, and different delivery points.

Both Sohio and Getty began treating the transactions as separate purchases and sales, and reported them as such to the DOE. As the DOE's Office of Hearings and Appeals ("OHA") itself later found, the parties intended to sell the respective crudes at prevailing market prices: "Thus, when the bargain was struck by Getty and Sohio, each firm contemplated receiving the other's crude oil at the generally prevailing market price for the grade of crude oil involved at the location where it was to be transferred." (Appendix F at 98a.)

Subsequent to the execution of the contracts, the Arab oil embargo occurred and price controls on domestic crude oil were imposed. Between August 19, 1973 and January 28, 1981, the maximum price which a producer could charge for domestic crude oil was determined by

the Mandatory Petroleum Price Regulations, set forth at 10 C.F.R. Part 212 (1977). During the time period pertinent to this case, the regulations provided, *inter alia*, that "no producer may charge a price higher than the lower tier ceiling price for any first sale of domestic crude oil." 10 C.F.R. § 212.73(a) (1977) (Appendix O). The regulations defined "price" as "any consideration for the sale of any property or services and includes commissions, dues, fees, margins, rates, charges, tariffs, fares, or premiums, regardless of form." 10 C.F.R. § 212.31 (1977) (Appendix O). The regulations did not define "consideration."

As a result of the Arab oil embargo, the value of the foreign crude purchased by Getty increased dramatically while domestic crude prices were frozen. Sohio was, consequently, suddenly selling its foreign crude to Getty at contract prices which were below prevailing market prices. Sohio was apparently content with that arrangement because it was passing through to its domestic customers not the price it was paying Getty for the domestic oil it was purchasing, but the higher "value" of the foreign crude it was selling to Getty.

THE PROCEEDINGS BELOW

The Administrative Proceedings

On August 15, 1974, one year after price controls began, Sohio, unbeknown to Getty, sought DOE permission to amend its reports so that the transactions with Getty could be retroactively reported as exchanges. After informing Sohio that the transactions were separate sales, the DOE conducted an audit of the transactions and issued a Notice of Probable Violation ("NOPV") to Sohio on October 11, 1974, charging that Sohio improperly treated the transactions as exchanges and that the cost of the domestic crude purchased by Sohio was the price which it paid Getty, not the value of the foreign crude which it sold to Getty at a lower price. After a secret

meeting with Sohio officials at which no records were kept, the DOE suddenly withdrew its NOPV on November 4, 1974.

Thereafter, the Getty/Sohio transactions were examined by the DOE's Offices of General Counsel, Compliance, Crude Oil Operations, Regulations Management, and the Office of the Assistant Federal Energy Administration ("FEA") Administrator. (Appendix G) Personnel in each office recognized that Getty's treatment of the transactions was lawful. For example, on February 14, 1975, Rendel Alldredge of DOE's Office of Crude Oil Operations wrote a memorandum stating:

> [I]t cannot be justifiably asserted either that the Sohio/Getty Arrangement violates any laws or regulations . . . or that it was entered into with any such intent . . . .

Alldredge recommended that the agency "move quickly to produce adequate definitions and delineations of and between sales and exchanges . . . ." (Appendix G at 156a)

In October 1975, Chuck Boehl of DOE's Office of Regulations Management reported to Assistant Administrator Gorman Smith that:

> General Counsel now apparently feels that FEA regulations permit the Getty-Sohio type of exchange and Sohio's method of booking costs. GC proposes to issue a proposed amendment to the regulations to be applied prospectively . . . .
>
> Although the two agreements seem related they are separate and payment is made for the crude in each case (which would seem to indicate a sale) . . . I am not convinced the Getty-Sohio deal for domestic crude is an exchange. (Appendix G at 157a)

On July 29, 1975, Assistant Administrator Gorman Smith ordered prospective rulemaking (Appendix G at 158a), which was not adopted until 1978 when the agency provided, for the first time, that matching purchases and

sales should be treated not as sales, but as exchanges. *See* Appendix P at 184a.

Nevertheless, on August 1, 1975, only three days after ordering such prospective rulemaking, the DOE issued an NOPV to Getty. On August 12, 1976, the DOE issued a Remedial Order to Getty charging Getty with a price violation for the period of October 1973 through October 1974 and an entitlements violation for the period of November 1974 through January 1976.[1]

Getty appealed the Remedial Order to the Office of Hearing and Appeals. The administrative proceeding before OHA was not conducted under the agency's rules of procedure that are now in place. At that time, there were no rules against *ex parte* contacts, no rules of discovery, no rules of evidence, no definitive rules of procedure, and no identifiable record. The burden of proof was on Getty. There were no witnesses, much less any opportunity to cross-examine them. Large portions of the record were secret from Getty, including evidence underlying the Remedial Order, evidence to support the calculation of the alleged overcharges, and evidence gathered *ex parte* in the course of OHA's investigation of Getty's appeal.

Getty sought discovery on several disputed issues of material fact, including objective evidence of Sohio's contractual intent, the calculation of alleged overcharges, and contemporaneous construction of applicable regulations. Getty's discovery was denied except as to the transfer price data base which the agency never provided—giving Getty computer summaries instead. Getty sought an evidentiary hearing on seven occasions which OHA denied. The chronology of Getty's unsuccessful attempts to obtain discovery and an evidentiary hearing is summarized in Appendix I.

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[1] The price violation assumed a sale, while the entitlements violation assumed that Getty had retained the crude.

On October 7, 1977, OHA issued a Final Decision and Order which found that the parties initially intended to receive the contract price for their respective crude oils, but that subsequent events changed the nature of the consideration. (Appendix F at 98a-99a) As a result, the Decision and Order concluded that the Getty and Sohio transactions thereupon became exchanges rather than sales. Based solely upon that finding, it concluded that there was a price violation by Getty because the foreign crude purchased by Getty thereby became part of the consideration for the domestic crude it had sold. Without notice to Getty or any opportunity to respond, the Decision and Order enlarged the period of alleged price violation by fifteen months. (Appendix F at 126a-127a) As a result, Getty's liability for the alleged price violation suddenly increased from $35,000,000 to over $84,000,000, exclusive of interest.

The Judicial Proceedings

Getty brought suit in the United States District Court for the District of Delaware seeking judicial review of the DOE's Decision and Order pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702-706 (1976), and seeking injunctive and declaratory relief pursuant to 28 U.S.C. §§ 1331-1332, 1337, 1361, 2201, and 2202 (1976). The Government counterclaimed for the amount of the overcharges found in the Decision and Order and for additional overcharges which had not been subject to any prior proceedings before the agency. On cross-motions for summary judgment,[2] the District Court, in its July 7, 1983, decision, affirmed Getty's liability for all

[2] Contrary to the decision of TECA, by moving for summary judgment seeking reversal of the DOE's erroneous rulings, Getty in no way admitted that there are no factual disputes in this case. Rather, Getty's motion was based on the numerous Constitutional and procedural defects in the DOE proceedings below, and other clear errors of law, and thus no underlying factual disputes were properly before the court.

but the first three-month period of the alleged violation, but concluded that the DOE had erred in calculating the amount of the overcharges by Getty and ordered a remand for a recalculation of damages.[3] (Appendix B at 43a) Following Getty's stipulation as to the calculation of damages which DOE would have made had this element of the remand gone forward, the District Court, by Final Order dated September 20, 1983, entered judgment for the DOE in the amount of $133,220,294.00, including prejudgment interest. (Appendix F)

TECA affirmed by decision dated September 26, 1984, modifying the District Court's judgment only as to the remedy, which TECA recognized was not an issue before it, having previously denied the participation of *amici curiae* on that very issue. (Appendix A)

REASONS FOR GRANTING THE WRIT

This Court has never granted a writ of certiorari for any case arising from TECA involving the issues of petroleum price controls or DOE procedures.[4] In the absence of any such review by this Court, TECA has evolved doctrines which substantially change the body of Constitutional law and administrative law, and which conflict with the decisions in virtually every circuit. Many of those changes are embodied in this case. They transcend energy regulation and will impact broad areas of commercial law.

In an adjudicative proceeding such as the one before the DOE, an agency may not rely upon *ex parte* submis-

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[3] Other elements of the Government's counterclaim were also remanded and remain on remand before the agency.

[4] This Court has granted certiorari in only two TECA cases. *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982), involved New York State taxes. *Fry v. United States*, 421 U.S. 542 (1975), involved salaries of state employees. By contrast, this Court frequently has granted certiorari in natural gas cases, which do not emanate from TECA.

sions and secret evidence, but TECA permitted DOE to do so here, in conflict with previous holdings of this Court, and of the Ninth and District of Columbia Circuits. Agencies may not place the burden of proof on the accused party, but TECA permitted DOE to do so, in conflict with this Court's prior decisions. Although there were numerous disputed issues of material fact, TECA upheld an agency adjudication that afforded no opportunity for the confrontation and cross-examination of adverse witnesses or for any testing of the evidence before an administrative law judge or other independent finder of fact, in conflict with the District of Columbia Circuit. Agencies may not enlarge the time period of alleged violations without notice or opportunity to respond, but TECA permitted DOE to do so here, in conflict with the Seventh and the District of Columbia Circuits. Agencies are required to follow their own rules, but TECA has permitted DOE to abandon those rules as well, in conflict with its own prior decisions.

Contrary to established rules, TECA has here, in effect, allowed evidence to be considered substantial for purposes of substantial evidence review even though there was no opportunity for adversarial testing of it either before the agency or in the District Court, in conflict with the District of Columbia Circuit.

Despite uniform holdings that prejudgment interest cannot be awarded where the regulation providing for it was not adopted in compliance with applicable rulemaking procedures, or where the amount of damages claimed was uncertain, TECA has upheld such interest here, in conflict with the Third Circuit, the Fifth Circuit, and TECA's own prior opinions.

TECA has permitted an agency which knew it needed a prospective rule, and adopted one, to apply the substance of that rule retroactively, in conflict with TECA's own prior decisions. The DOE's imposition of liability was based on a radical departure from then-existing reg-

ulations are from common law distinctions of sales versus exchanges. In so doing the historic definition of consideration and the principles of contract divisibility have been abandoned.

In the absence of review by this Court, TECA's departure from general precedent has been noted by commentators. (*See* Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 Duke L.J. 113, 151.) This criticism of TECA has been echoed in a report on *Appellate Review for Emergency Programs* dated October 1984 by the American Bar Association Section of Administrative Law. (American Bar Association, Administrative Law Section, *Recommendations and Report to the House of Delegates, American Bar Association: Report on Appellate Review for Emergency Programs* (1984))

If allowed to stand unreviewed, this decision of TECA and others like it will have transformed the Constitutional and administrative law of this country, and TECA will have warped and twisted historic doctrines in ways that will impact broad areas of commercial life.

I. THE DOE VIOLATED THE MOST FUNDAMENTAL REQUIREMENTS OF PROCEDURAL DUE PROCESS

In *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971), this Court declared that "[i]t is procedure that marks much of the difference between rule by law and rule by fiat."

Where, as here, an agency attempts to adjudicate private rights and liberties, the necessary procedures must include traditional judicial procedures. In *Hannah v. Larche*, 363 U.S. 420, 442 (1960), this Court said:

> [W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those

> agencies use the procedures which have traditionally been associated with the judicial process.

This does not mean that the DOE must convene a full trial to adjudicate. But it does mean that the agency must observe certain basic and fundamental procedures. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court specified the following procedures required by due process for agency adjudicative proceedings: (1) timely and adequate notice, (2) confrontation of adverse witnesses, (3) oral presentation of arguments, (4) oral presentation of evidence, (5) cross-examination of adverse witnesses, (6) disclosure to the claimant of opposing evidence, (7) the right to retain an attorney, (8) a determination on the record of the hearing, (9) a statement of the reasons for the decision and an indication of the evidence relied on, and (10) an impartial decisionmaker.

Virtually every one of these fundamental procedural safeguards was missing in the proceeding before the agency below:

First, the agency relied upon secret evidence which it received *ex parte* and never disclosed to Getty during the course of the agency proceedings. Appendix I lists some of that evidence. In *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977), this Court condemned receipt of evidence on an *ex parte* basis:

> Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those "in the know" is intolerable.

Second, Getty sought but was denied discovery on material facts in dispute. It is not proper for the Government to withhold the evidence on which it proceeded while purporting to afford the party an opportunity to appeal. Such a proceeding would be no more than "a

'game of blindman's buff.'" *Moore-McCormack Lines, Inc. v. United States*, 413 F.2d 568, 585 (Ct. Cl. 1969), *quoting Simmons v. United States*, 348 U.S. 397, 405 (1955). It is because DOE has now admitted that consideration is based on intent[5] that the denial by the agency of the discovery Getty sought as to Sohio's objective intent was so prejudicial.

Third, Getty sought but was denied cross-examination on material facts in dispute, which violates the doctrine set forth in *Alaska Airlines, Inc. v. CAB*, 545 F.2d 194, 200-01 (D.C. Cir. 1976). Not only was there no cross-examination, but there were no witnesses at all, and there was no evidentiary hearing.

Fourth, there were only minimal rules of procedure, and no rules of evidence, and no rules of discovery. The Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(C) (1976) (Appendix L), requires administrative agencies to publish adequate rules of procedure for their proceedings.[6] Those rules should include reasonably detailed procedures, and include those for notice of charges, opportunity to present evidence and to cross-examine adverse witnesses. *Gonzalez v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964) (agency action "cannot be left to administrative improvisation on a case-by-case basis."). In *Northern California Power Agency v. Morton*, 396 F.Supp. 1187, 1191 (D.D.C. 1975), *aff'd mem.*, 539 F.2d 243 (D.C. Cir. 1976), the court confirmed that a "reasonably complete code of procedures set out in advance by which actions can be guided, and strategies planned," is required.

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[5] *See infra* at 20.

[6] DOE is subject to this requirement of the APA. Section 207(a) of the Economic Stabilization Act subjected the Cost of Living Council, predecessor to DOE, to Section 552 of the APA. 12 U.S.C. § 1904 *note* (1976) (Appendix J). Section 5 of the Emergency Petroleum Allocation Act incorporated Section 207 and made it applicable to any regulation or order issued under the Act's authority. 15 U.S.C. § 754(a)(1) (1976) (Appendix K).

Here, the agency did not have a "reasonably complete code" of rules. The procedures set out in Subpart H of DOE's regulations, 10 C.F.R. Part 205 (1977), merely described the mechanical steps to be followed in filling an appeal, and OHA's discretionary powers in evaluating the appeal.[7] Relevant sections of Part 205 appear at Appendix M.

Fifth, there was no administrative law judge or independent fact finder, which undermines any semblance of a fair adjudication.[8]

Sixth, the burden of proof was on Getty. Under 10 C.F.R. § 205.106(b)(2) (1977) of DOE's regulations, mere allegations in a remedial order were assumed to be true. (Appendix M) The agency was not required to produce evidence to support or defend its allegations but the burden was upon the company to prove that the agency's action was erroneous in fact or in law. In *Norwood v. Harrison*, 413 U.S. 455, 471 (1973), this Court made plain that:

> No presumptions flow from mere allegations; no one can be required, consistent with due process, to prove the absence of violation of law.

In *Pan American World Airways, Inc. v. Boyd*, 207 F.Supp. 152, 154 (D.D.C. 1962), where as here the agency reached its tentative conclusions on the basis of a study, and then set hearings to receive comments on why the conclusions should not be carried into effect, the court declared that:

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[7] Thus, 10 C.F.R. § 205.106 (1977), permitted OHA to initiate an investigation of any statement in an appeal, solicit and accept comments from third parties subject to providing the appellant with an opportunity to respond, and in its discretion convene a conference or (non-evidentiary) hearing for the exchange of views on the appeal. (*See also* 10 C.F.R. §§ 205.108, 205.172 (1977)). (Appendix M)

[8] *See Gulf Oil Corp. v. DOE*, 663 F.2d 296 (D.C. Cir. 1981), where OHA engaged in *ex parte* communications.

> One cannot conceive a judicial tribunal first tentatively deciding a case *in camera ex parte*, and then trying it, putting the burden of proof on the parties who disagree with the tentative decision. Such a course seems contrary to the basic traditions of the common law and the fundamental concepts of our jurisprudence.

Finally, the time period of alleged price violation was enlarged by 15 months after Getty's opportunity to respond had expired. That action alone increased the amount of alleged price violation by more than $50 million exclusive of interest. That is precisely the practice that was addressed by the court in *Rodale Press, Inc. v. FTC*, 407 F.2d 1252 (D.C. Cir. 1968), where the Court stated:

> [I]t is well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change. . . .
>
> By substituting an issue . . . for the one framed by the pleadings, . . . the Commission has deprived petitioners of both notice and hearing on the substituted issue. The evil at which the statute strikes is not remedied by observing that the outcome would perhaps or even likely have been the same. It is the *opportunity* to present argument under the new theory of violation, which must be supplied.

Id. at 1256-57 (emphasis in original) (citations omitted).

TECA dismisses all of this with the assertion that no facts were in dispute and Getty had stipulated to damages. Because this was a summary judgment case, only facts not in dispute were properly before the court. Many facts, such as Sohio's intent, were disputed by Getty but dismissed as irrelevant by the District Court. Because that intent is now admitted to be relevant, it was prejudicial in the extreme to deny Getty's discovery on that issue. That issue and the others disputed by Getty go

not to the question of damages but to the question of liability.[9]

The effect of TECA's decision is to sustain an order arising from a proceeding without any of the procedural safeguards which are the hallmarks of Anglo-American law.[10]

Even if any one of these failures standing alone were not fatal (and many are), taken together they represent a complete failure by this agency to provide a fair adjudication and violate procedural due process.

If those procedural defects were present in an immigration case or a civil service case, the courts would be quick to act. They should be no less ready to intervene when it is an oil company which finds itself before an agency.

II. EVIDENCE WHICH COULD NOT BE TESTED CANNOT AS A MATTER OF LAW CONSTITUTE SUBSTANTIAL EVIDENCE

It is self-evident that where critical facts are disputed, the evidence must be explored and tested at some stage

---

[9] Getty's stipulation made during an oral conference with the court merely stipulated what DOE's damages would be, based on its theory, had a remand been ordered on that limited issue. The stipulation was entered into for the purpose of obtaining an appealable final order.

[10] DOE's procedures were not entirely unlike those of the infamous Court of Star Chamber. *See* M. Knappen, *Constitutional and Legal History of England* 317 (1942):

> The Star Chamber did not use the common law system of justice, but tended to employ the methods of the Roman law, which were very much more favorable to the executive. There was no jury; the suspect was not allowed to cross-examine or, in some cases, even to see the witnesses against him.

Here, too, there was no independent fact finder. Some of the evidence was secret and Getty was unable to test or challenge the remainder.

of a proceeding. If substantial evidence review precludes that testing process in the reviewing court through *de novo* discovery and cross-examination, *a fortiori* the evidence must have been disclosed and tested before the agency. In *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973), the court held that without such testing the record was inadequate for substantial evidence review:

> Informal comments simply cannot create a record that satisfies the substantial evidence test. Even if controverting *information* is submitted in the form of comments by adverse parties, the procedure employed cannot be relied upon as adequate.

Id. at 1260 (emphasis in original). The court then observed that:

> There must, however, be some mechanism whereby adverse parties can test, criticize and illumine the flaws in the evidentiary basis being advanced regarding a particular point. The traditional method of doing this is cross-examination . . . . But whatever procedure is followed, it must assure that the Commission has a substantial evidentiary basis for its findings and it must provide the court with an adequate record on review.

Id. at 1262-63. Similarly, in *Glendenning v. Ribicoff*, 213 F. Supp. 301, 303 (W.D. Mo. 1962), involving adjudication of a social security disability claim, the court declared:

> In an administrative hearing where the facts, as in the case at bar, are (1) adjudicative, (2) disputed and (3) critical, nothing less than submission through evidence, subject to cross-examination and rebuttal, will normally suffice.

Here, not only was the evidence untested but much of it was secret and unknown to Getty throughout the duration of the administrative proceeding.[11] If these proce-

---

[11] *See* Appendix H.

dures are allowed to stand as the basis for a judgment—whether it be for $1.33 or $133 million—then hundreds of years of Anglo-American procedural law will have been swept away.

III. TECA ERRED IN ALLOWING AN AWARD OF PREJUDGMENT INTEREST WHERE NO VALID REGULATION PROVIDED FOR PREJUDGMENT INTEREST AND WHERE THE AMOUNT OF DAMAGES CLAIMED WAS BOTH UNCERTAIN AND INCALCULABLE PRIOR TO THE ENTRY OF JUDGMENT BY THE DISTRICT COURT

DOE ordered Getty to pay interest on the overcharges assessed in the Decision and Order. (Appendix F at 126a) Such interest was assessed from the date of the transactions. This was improper for two reasons:

First, DOE has no regulatory authority to order interest on overcharges because the regulation which purports to confer that authority was promulgated without notice and comment. DOE relied upon § 205.195(a) of its regulations. (Appendix F at 123a-124a) As initially promulgated, § 205.195(a) was limited to DOE's authority to order refunds and said nothing whatever about assessing interest on such overcharges. Subsequently, without notice or comment, DOE amended § 205.195(a) to "clarify" that interest was required to be paid on refunds. (Appendix N) Such a fundamental change in the DOE's rules required the agency to conduct appropriate rulemaking proceedings. In *Texaco Inc. v. FPC*, 412 F.2d 740 (3d Cir. 1969), the court set aside a regulation which merely changed the method of calculating prejudgment interest, because that regulation had been adopted without complying with rulemaking procedures. If a regulation which merely changes the rate of interest for prejudgment interest requires rulemaking, *a fortiori*, a regulation imposing prejudgment interest in the first place would also require rulemaking.

Second, in *Eastern Air Lines, Inc. v. Atlantic Richfield Co.*, 712 F.2d 1402, 1410 (Temp. Emer. Ct. App. 1983), TECA held that "pre-judgment interest is not available where the amount of damages claimed to be due is uncertain." *See also Belcher v. Birmingham Trust National Bank*, 488 F.2d 474 (5th Cir. 1973). In this case, not only were the amount of damages claimed uncertain, but every element required to make that calculation was uncertain. The domestic prices, the volumes, and the transfer values which together are used to calculate the size of DOE's claim, were all uncertain, as demonstrated by the fact that the District Court found that DOE had used the wrong transfer values, volumes, and prices and initially remanded those questions for further proceedings. (Appendix B at 43a)

With respect to the last fifteen months of alleged violation, until the Decision and Order was issued the District Court recognized that Getty did not even know it was charged with a violation. (Appendix B at 32a) That being true, the amount claimed was hardly certain, and TECA's conclusions sustaining prejudgment interest, for which it provided no rationale at all, were in error.

IV. TECA ERRED IN ALLOWING THE DOE TO APPLY THE SUBSTANCE OF A PROSPECTIVE RULE RETROACTIVELY

This case represents an attempt by the DOE to engraft new regulatory mandates onto the regulations as they existed at the time of the Getty-Sohio transactions. As set forth in Appendix G hereto, DOE's officials acknowledged that Getty violated no applicable regulation. They recognized as well that prospective rulemaking was required if sales were to be treated as anything other than sales. The agency, in fact, embarked upon a rulemaking proceeding which, however, did not change the rules until 1978. That rulemaking for the first time defined an exchange as including matching purchases

and sales. *See* 43 Fed. Reg. 59,810 (Dec. 21, 1978); Appendix P.

The issue here is whether the value of foreign oil purchased by Getty was part of the consideration for domestic oil sold by Getty prior to February 1976 and before the 1978 rulemaking was accomplished.

In its Decision and Order of October 7, 1977, the DOE concluded that the parties initially intended to receive the contract price for their respective crude oils: "Thus, when the bargain was struck by Getty and Sohio, each firm contemplated receiving the other's crude oil at the generally prevailing market price for the grade of crude oil involved at the location where it was to be transferred." (Appendix F at 98a).

The DOE then made three fundamental errors of law:

First, it concluded, without citing any legal authority, that subsequent events changed the nature of the consideration. (Appendix F at 98a-99a) The DOE has now admitted, at page 25 in its Opposition Brief filed with the District Court, that consideration "is determined as of the execution date of the contract." Thus, the fundamental rationale of the Decision and Order—that the identity of consideration can be changed by subsequent events—was in error. As the Seventh Circuit held in *Peter Fox Brewing Co. v. Sohio Petroleum Co.*, 296 F.2d 274, 281 (7th Cir. 1961), "[t]he rights of the parties fixed by contract are not governed by comparing their subsequent relative gains or losses."

Second, DOE erred in disregarding the express price provision of the domestic contract in determining consideration. The domestic contract stated that the price could not exceed posted prices:

> The price to be paid for crude oil to Getty . . . shall be the posted prices specified [in the 1971 contract]

> or the price which Getty Oil may lawfully charge, which may in no event exceed posted prices.[12]

As the Third Circuit held in *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1009 (3d Cir. 1980), "the sanctity of the written words of the contract is embedded in the law of contract interpretation. . . . [A] court will make no inference or give any construction to the terms of a written contract that may be in conflict with the clearly expressed language of the written agreement."

DOE has cited no authority from any court in the land that express price terms in contracts can be disregarded or erased. The reasons are self-evident. Suppose a grocer contracts to buy a load of oranges at the then-market price, and at the same time, and because of that, loans the grower $15,000 at the maximum legal interest rate. If a killer frost then made the value of the oranges soar before they were delivered, would the subsequent frost make the now higher value of the oranges part of the consideration for the loan so that the hapless grocer becomes a violator of the usury law? That hypothetical is no more absurd on its face than the charge which Getty finds itself defending against in this case.[13]

Third, having erred in disregarding the express price provision of the domestic contract, and having erred in concluding that subsequent events change the identity of

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[12] It is not disputed that sales at "posted" prices would not violate any price control regulations. It is also not disputed that Getty did not receive any cash payment in excess of the posted prices.

[13] In the case at hand, the agreement as to the domestic crude, standing alone, was perfectly lawful. But under DOE's theory, with the presence of the agreement as to the foreign crude, Getty, to escape liability in January 1974 under that otherwise lawful domestic contract, would not only have had to give its oil to Sohio free, but pay Sohio 43 cents a barrel to take it. By January 1976 Getty would have had to pay Sohio $1.19 to take it. This is because the so-called excess value itself exceeded the ceiling price.

consideration, the DOE erred in concluding that because of those subsequent events, these sales became exchanges, thereby making the foreign crude purchased by Getty additional consideration for the domestic crude sold by it. In doing so, DOE erred yet again by disregarding the plain meaning of its own regulations.

Although the regulations as they then existed defined "price as any consideration for the sale of any property . . . ," 10 C.F.R. § 212.31 (1977), they did not define "consideration." (Appendix O) In that situation, as TECA itself has held in *Tenneco Oil Co. v. FEA*, 613 F.2d 298, 302 (Temp. Emer. Ct. App. 1979), "[t]he first principle of regulatory construction is that regulatory terms must be interpreted according to their commonly understood definitions in the absence of a specific regulatory definition."

That distinction between sales and exchanges was well established within industry practice, at common law, and under DOE's own regulations. That distinction was pointed out by the Sixth Circuit, which held in *Trenton Cotton Oil Co. v. Commissioner*, 147 F.2d 33, 36 (6th Cir. 1945), that an exchange "exclud[es] transactions into which money enters either as the consideration or as a basis of measure." Here it was both.

The DOE has also now admitted at page 25 of its Opposition Brief filed with the District Court that consideration "depends upon the intent of the parties." Here, the intent was for matching purchases and sales and not for exchanges. In this case if the parties had intended exchanges,

—there would have been no price clauses;

—nothing would have limited the domestic sales to posted prices;

—there would have been no price adjustment provision in the foreign contract to relate prices to values;

—the parties would not have paid for all the purchases in full;

—the payments would not have been at different times, 10 days for domestic and 90 days for foreign;

—the contracts would not have permitted the domestic deliveries to outlast the foreign if the foreign oil was the *quid pro quo* for the domestic; and

—both parties would not have begun treating the transaction as separate sales.

Both the District Court and TECA erred by approaching the problem as though their analyses could end when they concluded that the transactions could be treated as one. But that could not even begin a correct analysis. At common law under the established principles of contract divisibility, even if these agreements had been written as one contract, the obligations would be separate, and the considerations would be separate and distinct.

The doctrines of contract divisibility[14] are as old and well-established as contract law itself. Five factors must be examined in determining whether contracts are divisible and whether the considerations are separate: (1) intent,[15] (2) separately stated consideration apportioned to

---

[14] A "divisible contract" is one the performance of which is divided into different groups, each set embracing performances which are the agreed exchange for the others. 17A C.J.S. *Contracts* § 331 (1963).

[15] This is the most important factor:

> Primarily the question of whether a contract is entire or severable is one of intention, to be determined from the language which the parties use, and the subject matter and circumstances of the agreement.

17A C.J.S. *Contracts* § 332 at 309 (1963).

value,[16] (3) whether the performances are separate,[17] (4) separate subject matter,[18] and (5) separate assents.[19] Here, the intent, as shown above, was for matching purchases and sales, rather than for exchanges. The considerations were separately stated and apportioned as to value, because the domestic contract provided that the price of the domestic oil sold might "in no event exceed such posted prices," and the foreign contract contained a price adjustment clause which allowed the price to increase according to market value. The performances were separate because the domestic sales were not conditioned upon the continuation of the foreign purchases. The subject matters were separate because the transactions involved different types of oil, different countries of origin, different prices, different gravities, different sulphur contents, and different delivery points. Finally, there were unquestionably separate assents demonstrated from the fact that the agreements were written as separate contracts.

Thus, under the principles of contract divisibility, the contracts were divisible, the considerations were separate, and the foreign crude oil purchased by Getty was not additional consideration for the domestic crude oil sold by it. Consequently there was no price violation.

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[16] [W]here the portion of the contract to be performed by one party consists of several and distinct items, *and the price to be paid is apportioned to each item according to the value thereof* and not as one unit in a whole or a part of round sum, the contract will ordinarily be regarded as severable. . . .

17 C.J.S. *Contracts* § 334 at 312-13 (1963) (emphasis added).

[17] 17A C.J.S. *Contracts* § 331 (1963).

[18] 17A C.J.S. *Contracts* § 333 (1963). Different sales of different items constitute separate transactions. *See, e.g., Jones v. Pepsi-Cola Co.*, 223 F.Supp. 650 (D. Neb. 1963); *Purdin v. Westwood Ranch & Livestock Co.*, 67 Mont. 553, 216 P. 326 (1923).

[19] 17 C.J.S. *Contracts* § 331 (1963).

The remarkable thing about this case is that the DOE, the District Court, and TECA never found or relied upon any case law to support the conclusion that the foreign oil was added consideration for the domestic. Hundreds of years of contract law were washed away without any authority or any analysis of the principles of consideration or contract divisibility.

The point here is not that this Court should decide common law questions concerning consideration and contract divisibility. Instead, the issue is whether the principles of a prospective rule, which required matching purchases and sales to be treated not as sales but, differently, as exchanges, can be applied in an enforcement case to the period prior to that rule's adoption and effective date. *See generally SEC v. Chenery*, 332 U.S. 194, 202-03 (1947).

This is not the first time that TECA has allowed enforcement against Getty of a prospective rule which has not yet ben adopted. In *Getty Oil Co. v. DOE*, 581 F.2d 838 (Temp. Emer. Ct. App. 1978), when Getty was charged with overcharging for solvents, Judge Becker, writing for the majority, dismissed the failure of the price control regulations to include solvents as "immaterial." *Id.* at 842. By contrast, Judge Zirpoli, in his dissent, stated:

> If the price of solvents was subject to controls during the period of time relevant to this appeal, then those controls must be found in the agency's regulations, not in the agency's assertedly mandatory duty to issue such regulations. While the majority dismisses appellant's attack on the regulations, even the agency concedes that the pricing regulations, by their literal terms and without any need on Getty's part to resort to hypertechnical obfuscation, simply failed to cover solvents. It may well be that the agency *intended* to draft regulations covering solvents, but the plain fact is that it did not do so.

Id. at 843 (Zirpoli, J., dissenting) (emphasis in original).

The issue which needs to be decided by this Court is whether a business can be subjected to a judgment of more than $130 million when it is charged with violating an unstated regulation that the agency's own people in its Offices of General Counsel, Compliance, Crude Oil Operations, Regulations Management, and its Assistant Administrator, could not find.

If the rule announced by TECA itself in *Longview Refining Co. v. Shore*, 554 F.2d 1006, 1014 n.20 (Temp. Emer. Ct. App. 1977), *cert. denied*, 434 U.S. 836 (1977), that "[f]undamental fairness requires that the regulations be clear so that men of common intelligence need not guess at the meaning and differ as to the application," is to be abrogated, it will have a profound impact upon how our society will be governed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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84-730
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

GETTY OIL COMPANY,
Petitioner

v.

DEPARTMENT OF ENERGY, *et al.*,

AND

UNITED STATES OF AMERICA,
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 3-37

GETTY OIL COMPANY,
Plaintiff-Appellant,

v.

DEPARTMENT OF ENERGY, *et al.*,
Defendant-Appellee,

and

UNITED STATES OF AMERICA,
Counterclaimant-Appellee.

Appeal from the United States District Court
for the District of Delaware
(Civil Action No. 77-434)

(Argued March 8, 1984 Decided September 26, 1984)

Judgment Entered: October 5, 1984

WILLIAM E. WICKENS, Howrey & Simon, Washington, D.C., with whom William Simon, P.C., and Robert J. Brookhiser of the same firm; Charles F. Richards, Jr. and Stephen E. Herrmann, Richards, Layton & Finger, Wilmington, Delaware, were on the brief; R. David Copley and Robert E. Hafey, Getty Oil Company, Los Angeles, California, of Counsel, for Plaintiff-Appellant.

DAVID A. ENGELS, Department of Energy, Washington, D.C., with whom Larry P. Ellsworth and Charles L. Cope of the same agency; William C. Carpenter, Assistant United States Attorney, Wilmington, Delaware; and David M. Glass, Department of Justice, Washington, D.C., were on the brief for Defendant-Appellee and Counterclaimant-Appellee.

Before HOFFMAN, METZNER and LACEY, Judges.

METZNER, Judge.

Getty Oil Company ("Getty") appeals from a final order of the district court granting summary judgment to the Department of Energy [1] ("DOE") and the United States. This order embraces an opinion affirming a decision and order of DOE's Office of Hearings and Appeals ("OHA"), which found that Getty had violated DOE's producer price regulations, 10 C.F.R. Part 212 (1974), in its sales of domestic crude oil to Standard Oil Company (Ohio) ("Sohio"). In this opinion the district court also found that DOE had not abused its discretion in ordering Getty to make repayment of the amount of its overcharges to the Treasury, and that DOE had authority to assess Getty prejudgment interest on the amount found to have been overcharged. The final order also covers a memorandum reaffirming the award of prejudgment interest.

I

On appeal, DOE relies on the language of two contract documents signed by Getty and Sohio on May 16, 1973, to sustain its position. Getty agrees in its reply brief that "the material facts are undisputed," and that only a question of law is presented as to the main question raised on this appeal. That question is whether DOE correctly determined that the 1973 documents jointly comprised one integrated agreement by which Getty traded domestic crude for Sohio's foreign crude with money payments merely equalizing the net values received.

The relevant facts are set forth in the district court's opinion, *Getty Oil Co. v. Department of Energy*, 569 F. Supp. 1204, 1206-08 (D. Del. 1983), and familiarity

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[1] For ease of narration, this opinion shall include the predecessor agencies, Federal Energy Administration and Federal Energy Office in "DOE."

with that opinion is assumed. Briefly, Getty and Sohio executed two documents on May 16, 1973. One provided for Sohio to sell 25,000 barrels per day of foreign crude oil to Getty to be delivered outside the United States. Getty used this oil to fulfill contracts it had in the Far East. The other provided for Getty to sell an identical amount of domestic crude to Sohio in this country. Similar trades are common in the oil industry. They provide each party with the oil it needs at a place where it is needed, at a cost lower than that which would be incurred if each company had to ship its oil to a distant location. The agreements were for a term from January 1, 1974 to January 1, 1977, with one year extensions subject to termination on twelve months' notice.

These documents were intended to continue a relationship whereby Getty supplied Sohio with domestic oil, while British Petroleum ("BP") supplied Getty with foreign oil. BP's parent company had a 26 per cent interest in Sohio. It was Sohio's assumption of BP's role as supplier to Getty that produced the instant problem.

The price for the purchase of domestic oil by Sohio was "the posted prices" or "the price which Getty Oil may lawfully charge, which may in no event exceed such posted prices." The price for the purchase of foreign oil by Getty was the domestic price less fixed differentials for Iranian Light Export oil and Abu Dhabi Export-Murban oil. The fixed differentials reflected the differences between the domestic and the foreign prices in effct in May 1973. The price of the foreign oil was subject to renegotiation at the request of either party. Cash payments were to be made under the contracts for the oil received.

As the district court observed, the two contracts "were coextensive in duration, expressly related to each other in respect to price, volume, term and termination, negotiated at the same meeting and executed on the same

date." 569 F. Supp. at 1209. In addition, the domestic sales contract provided that should Sohio ultimately not supply Getty with the same amount of foreign oil as Getty had supplied Sohio domestically, Sohio would redeliver to Getty a sufficient quantity of domestic oil to make the total number of barrels delivered under each contract equal. The district court found that Getty and Sohio would not have executed one contract without concurrently executing the other, so that it was not surprising that DOE eventually concluded that "the value bargained for under one . . . contract [w]as part of the consideration of the . . . oil supplied under the other." *Id.* at 1210.

The producer price regulations in effect for 1974-76 provide that "no producer may charge a price higher than the lower tier ceiling price for any first sale of domestic crude oil." 10 C.F.R. § 212.73(a) (1974). "Price" includes "any consideration for the sale of any property or services and includes commissions, dues, fees, margins, rates, charges, tariffs, fares, or premiums, regardless of form." 10 C.F.R. § 212.31 (1974). The regulations do not define "consideration."

It is undisputed that the monetary price charged by Getty for its domestic oil under the 1973 agreements was permissible under Section 212.73(a). It is also undisputed that after the general price increases for foreign oil in late 1973, the price Getty charged for its oil exceeded the regulatory maximum if the foreign and domestic crudes were indeed consideration for each other.

A regulatory agency is no more bound than is a court by the form in which regulated parties choose to cast a transaction, but may look beyond form to the economic substance, in order to further the regulatory purpose of Congress. *Tenneco* v. *F.E.A.*, 613 F.2d 298, 302 (Temp. Emer. Ct. App. 1979); *Mobil Oil Corp. v. F.P.C.*, 463 F.2d 256 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 976

(1972). That is precisely what DOE sought to do in this instance.

The district court correctly affirmed the finding by DOE that the documents constituted a single integrated transaction as a matter of law.

II

Getty argues that DOE itself initially recognized that Getty's treatment of the transactions was lawful. DOE went so far as to issue a Notice of Probable Violation ("NOPV") to Sohio declaring that the transactions were separate. Furthermore, certain agency personnel continued to view the sales as distinct even after that NOPV was withdrawn.[2]

Finally, Getty notes that the agency did not promulgate regulations deeming matching purchases and sales of crude oil to be exchanges until December 1978, 43 Fed. Reg. 59,810, 59,813 (12/21/78). Accordingly, Getty contends, the agency exceeded its authority in finding that Getty had committed a price violation by imposing sanctions upon Getty when the applicable law and regulations did not provide fair notice that the company's treatment of the transactions was improper. *See Tenneco*, 613 F.2d at 303; *Longview Refining Co. v. Shore*, 554 F.2d 1006, 1014 n. 20 (Temp. Emer. Ct. App.), *cert. denied*, 434 U.S. 836 (1977).

The NOPV to Sohio was issued on October 11, 1974, and revoked only three weeks later. The promulgation and retraction of that short-lived NOPV did not constitute an admission by DOE that the regulations were so confusing that the proper construction of the 1973 docu-

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[2] Throughout 1975 and 1976, various DOE personnel were uncertain that Getty, and not Sohio, had violated the existing regulations. *See, e.g.*, the materials reproduced in the Appendix at pages 4610, 4617-19, 4628, 4631, 4633, 4645, 4658-59, 4677-78 and 4681-83.

ments was impossible to ascertain. *Cf. Department of Energy v. Louisiana*, 690 F.2d 180, 189 (Temp. Emer. Ct. App. 1982) (agency reinterpretation of a regulatory term not an indication that term was unclear). The internal DOE memoranda discussing the propriety of the agency's action are of no consequence. After thorough consideration, DOE adopted its position concerning the 1973 Getty-Sohio agreements in August 1975, and has adhered to that position ever since. *See Mobil Oil Corp. v. Tully*, 653 F.2d 497, 501-02 (Temp. Emer. Ct. App. 1981), citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The FEA memoranda cited by Getty do not evince a pattern of public pronouncements to the contrary. *Compare Standard Oil Company v. Department of Energy*, 596 F.2d 1029, 1052-56 (Temp. Emer. Ct. App. 1978).

In fact, there was no ambiguity or vagueness in the regulations as they applied to this transaction. The lack of a regulation covering this type of transaction does not mean that there is any confusion.

The problem in this case is one of contract law. While there was no definition of "consideration" in the regulations, that term is clearly defined in the law. In a bilateral contract, which exists here, the promise by one party is the consideration for the promise by the other party. 1 Corbin, CONTRACTS, sec. 142, p. 611 (1963). Getty promised to furnish crude oil and money to Sohio which in turn promised to furnish crude oil and money to Getty. In any litigation over the terms and effect of a contract, the losing party is not excused from paying damages because it had a belief that its actions were in conformity with the law applicable to the transaction.

With the advent of controls, the price Getty could charge Sohio for domestic oil was frozen at the maximum lawful price. Getty could not complain about that since every seller of domestic oil was treated equally. How-

ever, the price of foreign oil here was tied to the domestic price, with the result that Sohio was required to deliver expensive oil to Getty for the relatively cheap oil it was receiving.

Neither party wanted or expected to make money on this transaction. The proviso in the foreign oil document for price renegotiation on the request of either party supports this view. If the price of foreign oil went up, as it did here, Sohio could request renegotiation and Getty had two options. It could either agree to change the differentials or terminate the contract. In the latter event Getty would have to purchase its requirements in the open market. In either event it would end up paying the increased price of the foreign oil it needed in relatively the same amounts as it is being called upon to pay under DOE's order. Getty is not being penalized nor treated unfairly by the order of DOE.

The observation is in order that if for some reason the price of foreign oil went down in terms of the fixed differentials, Getty would have requested renegotiation downward of the foreign price.

III

Getty has made several other arguments which are discussed below.

A. The application of the substantial evidence rule was argued extensively in Getty's main brief. However, in its reply brief on p. 8 it says:

> "In this case, the material facts are undisputed and based entirely on a paper record. Under the circumstances, the substantial evidence rule does not apply, because the consideration question is a question of law which is subject to *de novo* review, and this Court is under no obligation to defer to the agency's legal conclusions."

B. Getty also asserts that it was improperly denied certain discovery, as well as an evidentiary hearing it had requested on disputed issues of fact. Even if those allegations are true,[3] Getty's statement on appeal that there are now no disputed material facts renders that objection moot. Moreover, since the Sohio 701 forms which Getty had sought were provided to it during the proceedings in the district court, it had the opportunity to examine them before making its argument on appeal.[4]

C. Under the regulations governing the entitlements program at the times involved in this case, if Sohio and Getty had indeed exchanged their crudes one for the other, then "no volumes of old oil [would have been] deemed to have been transferred." 10 C.F.R. § 211.67(g) (definition of an "exchange" for purposes of the entitlements program). Rather, Getty and Sohio would each have been deemed to have retained the crude they had delivered to the other party. Getty contends that as a result, even if the 1973 agreements had constituted an "exchange" of crude, Getty could not have violated the producer price regulations since under the regulations as a whole it would not be deemed to have parted with any of its domestic oil.[5]

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[3] *See* Appendix at 1043-44.

[4] This case is distinguishable from *Gonzalez v. United States*, 348 U.S. 407 (1955), relied on by Getty to support its argument that the production of Sohio's 701 forms at the district court proceedings did not cure DOE's failure to produce them while the agency proceedings were pending. *Gonzales* dealt with nonproduction of the document before the Selective Service Appeal Board whose determination is "considered 'final' in the courts, not to be overturned unless there is no basis in fact." 348 U.S. at 412. By contrast, here the court may overturn DOE's action if it either exceeded the agency's authority, or was not founded upon substantial evidence. Consequently, Getty had the opportunity to reargue the facts in the district court.

[5] It is worthy of note that certain Getty personnel submitted affidavits in which they strenuously denied that the 1973 contracts worked an "exchange" for purposes of the entitlement regulations. *See, e.g.*, Appendix at 484, 507.

The entitlements regulations were imposed to preserve the domestic supply of lower-priced oil, and Section 211.67(g) ensured that domestic old oil would not vanish from the nation's supply by means of such trades or exchanges. We are not concerned with the entitlements program in this case.

D. Section 211.63 provides that "[a]ll contracts for sales, purchases and exchanges of domestic crude oil in effect on December 1, 1973 shall remain in effect for the duration of this program. . . ." Getty argues that whatever the original effect of the 1973 agreements between it and Sohio, after January 1, 1974, when Section 211.63 came into force, the two agreements were clearly supported by separate consideration because Getty was unable to cancel the domestic agreement even if Sohio had terminated the foreign one.

That the 1973 agreement may have been *severable* after the promulgation of Section 211.63 does not mean that it necessarily *became* two separate agreements after that date. Section 211.63 mandated the continuation of the domestic part of the 1973 contracts in the face of potential developments, but did not change the nature of the consideration flowing between Getty and Sohio under the contracts then in place. Furthermore, the regulation did not prevent Getty from exercising any right to terminate since it never was in a position to do so under the agreement. It had this right only if Sohio chose to terminate the foreign oil portion which Sohio never did.

E. Getty argues that in its decision and order DOE "dramatically changed the theory of the violation with which Getty was charged," denying Getty adequate notice that it was being charged with a price violation for the period November 1974 to February 1976. The basis for liability for this period was the same as that for the period immediately preceding for which Getty did receive notice and which it fully litigated. It was not

prejudiced in the least by the addition of the later time period. Furthermore, it has stipulated the amount of damages for that period.

F. As Getty observes, "the proper disposition of the funds which Getty was ordered to pay to the United States Treasury . . . has not been raised by any of the parties and is therefore not properly before this Court."[6] Presently DOE has issued an interlocutory order regarding future proceedings as to the disposition of the funds. Interlocutory Order, Case Nos. HRR-0071, HCX-0091, November 29, 1983. This matter is remanded to the district court to modify its judgment to provide that the amount of damages shall be deposited in the district court in an appropriate interest-bearing account pending further order of the court after DOE has acted upon the remand. We assume that DOE will consider the rights of all parties, including Getty and any parties seeking to intervene, if they have such rights, to the proper disposition of these funds.

G. Finally, Getty contends that the district court's allowance of prejudgment interest was in error because the amount of the claimed overcharges was uncertain. The district court has adequately and correctly disposed of this issue.

IV

For the reasons stated, the judgment of the district court is modified as indicated above, and affirmed as so modified.

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[6] Reply brief at 11, n.14.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Civil Action No. 77-434

GETTY OIL COMPANY,
Plaintiff,

v.

DEPARTMENT OF ENERGY, *et al.*,
Defendants,

and

UNITED STATES OF AMERICA,
Counterclaimant.

Charles F. Richards, Jr., Esquire, Richards, Layton & Finger, Wilmington, Delaware; William Simon, Esquire, William E. Wickens, Esquire, Frederick S. Frei, Esquire, Joanne Parsons Underhill, Esquire, Howrey & Simon, Washington, D.C.; C. Lansing Hays, Esquire, David A. Ross, Esquire, Dechert, Price & Rhoads, New York, New York; R. David Copley, Esquire, Robert Hafey, Esquire, Getty Oil Company, Los Angeles, California, Attorneys for Plaintiff.

Joseph J. Farnan, Jr., Esquire, United States Attorney, Wilmington, Delaware; Nancy C. Crisman, Esquire, Larry P. Ellsworth, Esquire, David A. Engels, Esquire, Mark Kreitman, Esquire, O. Ann Horn, Esquire, Barry Sheingold, Esquire, Office of General Counsel, Department of Energy, Washington, D.C., Attorneys for Federal Defendants.

OPINION

Wilmington, Delaware

July 7, 1983

STAPLETON, District Judge:

Plaintiff Getty Oil Company ("Getty") seeks this Court's review of a decision of the Department of Energy ("DOE") Office of Hearings and Appeals ("OHA") issued October 7, 1977 ("the October 7th Decision"), which found Getty had overcharged Standard Oil Company of Ohio ("Sohio") more than $84 million for price-controlled domestic crude oil. The United States counterclaims for that amount, plus approximately $27 million in additional overcharges stemming from the transactions addressed in the October 7th Decision. The case is currently before this Court on cross-motions for summary judgment.

I. BACKGROUND

A. *The Transactions*

In July 1971, Getty and Sohio entered into an agreement in which Getty agreed to sell Sohio 25 thousand barrels per day of domestic crude, which at Getty's request was expressly contingent on sale of an equal volume of foreign crude to Getty by British Petroleum Company, Ltd. ("BP"). A.R. 589. Getty's contract for sale of domestic crude to Sohio was for the period January 1972 through December 1973, and from year to year thereafter unless terminated by either party. A.R. 53. BP's agreement to sell foreign crude to Getty, through its European subsidiary, BP Trading, Ltd., was for the identical term. A.R. 60. The domestic and foreign volumes to be exchanged pursuant to these agreements were to be equivalent:

> Should either agreement be terminated as to all or a portion of the crude oil covered by the respective

agreements, then the other agreement shall be terminated as to a similar quantity of oil.

A.R. 589. Pursuant to these agreements, Getty in fact transferred approximately 25 thousand barrels per day of domestic crude to Sohio and BP transferred to Getty approximately 25 thousand barrels per day of foreign crude. A.R. 298, 783, 784. Reciprocal cancellations of the 1971 agreements were to take effect on January 1, 1974. A.R. 591, 595.

During 1973, Getty and Sohio negotiated an extension of the existing 1971 reciprocal domestic and foreign agreements, with Sohio proposing to assume BP's rights and responsibilities under the foreign agreement. On May 2, 1973, three Getty representatives and three Sohio officials met in Houston to discuss the details of a three-year extension of both 1971 agreements. A.R. 131. At that meeting the parties reached tentative agreement on the principles of extension of both the foreign and domestic transactions. A.R. 131-134. It was decided to execute two new contracts to reflect the terms agreed upon. *Id.* A Getty memorandum of the May 2nd meeting refers to the "crude oil exchange agreements" and to the "tentative agreement" reached. *Id.* Immediately after the May 2nd meeting, Jack Brandon of Getty prepared a single outline covering the terms of "the tentative agreement." A.R. 132. This "Outline of Basic Principles of Proposed Agreement" covered both the foreign and domestic transactions as if they were one agreement. *Id.* Only after this agreement was reached did the parties draft two separate contracts. The contracts were drafted on the basis of this outline. A.R. 131.

Both contracts were dated and executed May 16, 1973. A.R. 119, 612, 629. The contract for sale of foreign crude by Sohio to Getty ("the foreign agreement") specifies a term from January 1, 1974 to January 1, 1977, and year-to-year thereafter unless twelve months' notice of termination is given. A.R. 612. The contract

for sale of domestic crude by Getty to Sohio ("the domestic agreement") identically provides for a three-year extension of the existing 1971 domestic agreement, from January 1, 1974 to January 1, 1977 and year-to-year thereafter, with twelve months' notice of termination. A.R. 629, 632.

The term of the two contracts are interdependent. The price of foreign crude to be delivered to Getty under the foreign agreement is equal to the price set in the domestic agreement less a per barrel differential:

> Buyer [Getty] shall pay to Seller [Sohio] for the quantities of each shipment a price per barrel f.o.b. loading terminal equal to the price per barrel paid by Seller to Buyer for oil purchased by Seller during the month in which said shipment commences loading, under that certain crude oil purchase agreement of July 30, 1971, as revised, amended and extended by an agreement executed as of May 16, 1973 (said "May 16, 1973 agreement") executed by the parties hereto concurrently herewith, less a differential of $1.770 per barrel for Iranian Light Export Oil and less a differential of $1.562 per barrel for Abu Dhabi (Land) Export-Murban crude petroleum.*

A.R. 614. The price for foreign oil can not be determined independently under the foreign agreement, but only by specific reference to the domestic agreement.

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* At the time Getty and Sohio entered the May 1973 transaction, no price controls governed first sales of domestic crude oil at the producer level. A.R. 1330. The spiral of OPEC price increases had not begun, and market price for similar grades of crude, foreign and domestic, was roughly comparable, adjusted for location. In fact, the prevailing price of foreign crude at the locations where Getty was to take delivery from Sohio was *less* than the posted price of domestic crude where Sohio took delivery from Getty. A.R. 1331. Accordingly, the contracts provided a per-barrel differential ($1.77 for Iranian light, $1.562 for Murban) to compensate for the then prevailing higher price of domestic crude. A.R. 303.

Paragraph 6 of the foreign agreement provides for price adjustments, also linked to the domestic agreement. Should either party allege that the price of foreign crude was "more or less than its value relative to the price under the [domestic agreement]," it could seek a price adjustment. A.R. 617.

Should Sohio seek such adjustment and Getty refuse, the foreign agreement allows Sohio the option to cancel the foreign agreement, but concurrently provides Getty the option to cancel the domestic agreement. A.R. 616, 617 § 6. If Getty should seek such an adjustment and Sohio refuse, Getty was entitled to cancel the foreign agreement, but the domestic agreement would remain intact. The domestic agreement provides that it may be terminated on less than 12 months' notice only as permitted under the provisions of the foreign agreement:

> [The domestic agreement] shall be subject to termination as provided in that certain crude Petroleum Sale Agreement dated May 16, 1973, between the parties hereto, executed concurrently herewith, relating to the purchase by Getty Oil from Sohio of Iranian Light Export and Abu Dhabi (Land) Export-Murban crude oil.

A.R. 630.

The foreign agreement requires that "balancing quantities" be delivered under both the foreign and domestic agreements. The foreign agreement states: "It is the intent of each party to receive the volumes of crude petroleum specified hereunder and under said May 16, 1973, [domestic] agreement." A.R. 615 § 5. The agreements provide that, should deliveries by Sohio be short because of *force majeure*, Getty may require Sohio to make up the shortfall after expiration of the foreign agreement by delivery of domestic crude of the same grades delivered by Getty under the domestic agreement, and priced pursuant to the provisions of the domestic agreement. A.R. 615, 616 § 5.

Beginning in September 1973, the petroleum price control regulations, initially adopted by the Cost of Living Council in August 1973 (6 C.F.R. § 150 Subpart L), and subsequently adopted in January 1974 by DOE's predecessor agency, the Federal Energy Office ("the FEA") (10 C.F.R. Part 212, Subpart D), established a maximum ceiling price for domestic crude oil equal to applicable May 15, 1973 posted price levels, plus certain allowable increases.* In October 1973, OPEC increased its crude prices by approximately 70%. By January 1974, the world market price for foreign crude was generally four times greater than it had been one year earlier. A.R. 1331. As a result, the value of foreign crude Getty received from Sohio increased dramatically.

When the bargain was struck by Getty and Sohio in 1973, each firm had contemplated receiving crude oil at generally prevailing market prices. A.R. 1199. When the price of foreign crude spiralled upward, Sohio sought no adjustment, apparently being willing to accept price controlled domestic crude for its market priced foreign crude because the price regulations permitted a refiner to account for the cost of its crude oil as a product cost, and pass on that cost to purchasers of its refined products. 6 C.F.R. §§ 150.355(g), 150.356(b); 10 C.F.R. §§ 212.82(f), 212.83(b) OHA found that Sohio measured the cost of the domestic crude it received from Getty by the market value of the foreign crude which it delivered to Getty and passed through to its customers as product cost an amount equal to the difference between the value of the foreign crude Sohio gave up and the domestic crude Sohio received. Getty claims it was wrongfully deprived of discovery regarding Sohio's treatment of its dealings with Getty and does not concede that Sohio treated the difference between the value of the

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* These regulations remained effective in substantially the same form until January 28, 1981, the date of decontrol of petroleum prices.

oils delivered as a part of its cost. With this exception, however, the facts thus far recited are undisputed.

B. *The Administrative Proceedings*

DOE initially took the position, in a Notice of Probable Violation ("NOPV") issued to Sohio in 1974, that Sohio's pass-through of the value of the foreign crude it transferred to Getty was unlawful because, it was thought, Sohio's cost was solely the cash amount Sohio paid to Getty for Getty's domestic crude. A.R. 1-3. Following the issuance of that NOPV, the agency reconsidered its position and determined that Sohio's true product cost included the value of the foreign oil which Sohio gave up. Three weeks after its issuance, the NOPV to Sohio was withdrawn. A.R. 6.

In August 1975, DOE issued an NOPV to Getty which alleged that the agency:

> has reason to believe that the transfer of old oil by Getty in return for higher-valued foreign oil between October 1973 and the current time, constitutes the charging of a price by Getty in excess of the ceiling price, in violation of 10 C.F.R. § 212.73 since January 15, 1974, and 6 C.F.R. § 150.354, between October 1973 and January 15, 1974.

A.R. 11. The NOPV also charged a violation of the Entitlements Program, 10 C.F.R. § 211.67.

After consideration of Getty's response to the NOPV, DOE issued a Remedial Order ("RO") to Getty in August 1976. A.R. 178. Getty filed an appeal with OHA in October. A.R. 277. Sohio submitted extensive comments at the appeal state, A.R. 579, and the Air Transport Association of America ("ATA") intervened in support of the Remedial Order. A.R. 693, 817. A hearing was conducted in March 1977. A.R. 855. On October 7, 1977, OHA's Decision and Order issued, affirming the finding of Getty's violation. A.R. 1295. The October 7th

Decision rescinded the allegation of an entitlements violation, concluding instead that Getty was liable for a crude oil ceiling price violation during the period October 1973 through January 1976. The Decision further concluded that refund through Sohio to directly affected purchasers was not feasible, and ordered Getty to remit the overcharges to the United States Treasury.

II. THE "PRICE" ISSUE

A. *The 1973 Agreements*

The regulation governing maximum prices for crude sales by producers is 10 C.F.R. § 212.73. During the period relevant to this case, it read:

> (a) *Rule.* Except as provided in section 212.74, no producer may charge a price higher than the ceiling price for the first sale of domestic crude oil.
>
> * * * *
>
> (b) *Ceiling price determination.* The ceiling price of a particular grade of crude oil in a particular field is the sum of (1) the highest posted price at 6 a.m., local time May 15, 1973, for that grade of crude oil at that field, or if there are no posted prices in that field, the related price for that grade of domestic crude oil which is most similar in kind and quality at the nearest field for which prices are posted; and (2) a maximum of $1.35 per barrel.
>
> The regulations define "price" as follows:
>
> "Price" means any consideration for the sale of any property or services and include commissions, dues, fees, margins, rates, charges, tariffs, fares, or premiums, regardless of form.

10 C.F.R. § 212.31.

The threshold issue in this case is whether the DOE was acting within its autohrity when it treated the do-

mestic and foreign agreements as a single economic transaction or whether those agreements must be regarded as "separate and distinct purchases and sales of crude oil", as contended by Getty. (Complaint ¶ 42(a)). Taking the former approach, the DOE concluded that the value of the foreign oil received by Getty was properly considered part of the consideration received for the domestic oil. If the latter approach is required, however, the price received for Getty's domestic oil would be limited to the cash payment under the domestic agreement. I conclude that the DOE was authorized to treat the 1973 domestic and foreign agreements as an integrated transaction and to conclude that the value of the foreign oil constituted part of the consideration for Getty's domestic oil. Based on the existing administrative record, I reach a contrary conclusion with respect to the domestic and foreign agreements entered into in 1971.

A regulatory agency is not bound by the form that regulated parties have chosen for a particular transaction. It may look through the form to the economic substance of the transaction whenever the regulatory purposes of Congress will be served by doing so. *E.g., Mobil Oil Corp. v. FPC*, 463 F.2d 256, 259 (D.C. Cir. 1971), *cert. denied* 406 U.S. 976 (1972). As noted in *Tenneco v. FEA*, 613 F.2d 298, 302 (TECA 1979), "where a transaction is in substance and economic effect a sale [within the meaning of the DOE regulations, neither the agency nor a reviewing court is] . . . bound to follow the labels chosen by the contracting parties." Moreover, while there are limits on how far an agency may stray from the "plain meaning" of undefined regulatory terminology, those limits are not exceeded when the agency's construction of its regulations is a rational one when considered in light of the regulatory text and the Congressional purpose. The "plain meaning" rule of construction is thus not a linguistic straightjacket, but rather a safeguard against exotic interpretations which

have the effect of depriving those regulated of a fair opportunity to conform their conduct to the law. *Id.*

The agency concluded in this case that in substance and effect the 1973 domestic and foreign agreements were one transaction and that Getty had bargained for Sohio to deliver the foreign oil in exchange for its promise to deliver the domestic oil. There is ample support for these conclusions. As the above recitation of the undisputed facts indicates, the contracts executed by Getty and Sohio in May 1973 were interdependent. They were coextensive in duration, expressly related to each other in respect to price, volume, term and termination, negotiated at the same meeting and executed on the same date. Moreover, there is no suggestion that either party would have been willing to enter one of the contracts without simultaneously entering into the other.* Indeed, the only inference which can rationally be drawn from the contracts themselves is that one contract would not have been executed without the other.

The purpose of the price control program was to limit the economic value that could be received by a seller of domestic oil. In this context, it is hardly surprising that the DOE views the value bargained for and received under one reciprocal contract as part of the consideration for the domestic oil supplied under the other. Indeed, as the agency decision noted, the effectiveness of the price control program would be put in jeopardy if a party could exclude from the "price" received for controlled crude a portion of the bargained for consideration through the simple expedient of executing two reciprocal contracts.

Getty stresses that the 1973 agreements were entered into prior to the inauguration of the price control pro-

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***I do not understand Getty to claim otherwise. It has, for example, characterized the interrelationship between the two 1973 agreements as "an inducement to contract." A.R. 443.**

gram and the parties, accordingly, could not have intended to evade that program. It also points out that the terms of the two agreements differ in several respects.* The absence of an intent to evade and the existence of some differing contract terms are not significant, however, if the *effect* of the arrangement in the price controlled market place was to allow Getty to exclude from the "price" for its domestic oil part of the consideration which it bargained for.

Getty also argues that the agency has violated the rule that terms not otherwise defined in its regulation must be given their "common law" or "plain meaning." *See e.g., Tenneco Oil Co. v. FEA*, 613 F.2d 298 (TECA 1979). In particular, it urges that the DOE has ignored the plain and common law meaning of the word "consideration." Sohio's foreign crude fits comfortably within the common law concept of consideration, however, if the two contracts are properly viewed as constituting one bargain for regulatory purposes. Moreover, even if the DOE's view were not precisely coterminous with the common law concept of consideration, given the purpose of the price control program, regulated entities

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* As earlier noted, the domestic agreement could survive foreign agreement under one set of circumstances which did not occur during the violation period. Payment under the domestic agreement was due within 10 days of receipt of invoice. Payment under the foreign agreement was due in 90 days. The foreign agreement provided for arbitration of disputes. There was no dispute resolution provision under the domestic agreement. The parties could sue. The domestic agreement provided absolute exemption from liability as a result of *force majeure*. Under the foreign agreement Sohio was required to make up shortfalls of delivery resulting from *force majeure* or other causes within 12 months. If Sohio was unable to provide the "balancing" quantities within 12 months of the expiration of the foreign agreement, Getty had the option of purchasing substitute domestic crude oil in lieu thereof. The foreign agreement was governed by the law of the State of California. The domestic agreement failed to specify the governing law.

should certainly have anticipated the possibility that the agency would take such a view. Since I agree with the agency that the 1973 agreements may properly be considered as a single bargain, I cannot fault the agency's conclusion that the consideration that Sohio paid for Getty's price controlled domestic crude was the foreign crude which it transferred to Getty plus the net cash differential received by Getty under the terms of the agreement.

Getty also urges that the DOE single agreement approach is an arbitrary one because it fails to take into account the fact that the parties concurrently negotiated and executed a third document in which Getty agreed to buy Sohio's net profits interest in the California Kern River oil field. Since Sohio's sale of that interest was contingent on Getty's extension of the 1971 domestic agreement, Getty argues that the agency must either treat each agreement separately or all three as one. Getty's logic is unpersuasive, however, because the Kern River contract, while concurrently negotiated and executed, was not otherwise interrelated by its terms with the crude oil sales agreement.

Getty next argues that the 1973 domestic and foreign agreements could not be regarded as a single contract after the adoption of 10 C.F.R. § 211.63 on January 15, 1974. According to Getty, this regulation had the effect of foreclosing it from exercising its option to terminate the domestic agreement in the event Sohio terminated the foreign agreement. Thus, Getty argues that after January 15, 1974, the continuation of the domestic agreement was not tied to the continuation of the foreign one. While this argument is creative, it is unpersuasive upon analysis.

Finally, Getty contends that the OHA decision and order are inconsistent with *Shell Oil Company v. FEA*, 527 F.2d 1243 (TECA 1975). Shell there successfully

attacked the validity of DOE regulations which purported to regulate service station rents as an adjunct to petroleum price regulation. The court stressed that the regulation purported to regulate service station rents across the board including rents charged by lessees who did not supply petroleum products to their lessors. It noted that the case was therefore different from one in which the DOE believed that a lease was being used by a refiner as a way of obtaining more than a ceiling price for petroleum product supplied to the tenant. In this case the DOE has not adopted a regulation purporting to regulate the selling price of foreign crude. Rather it has analyzed a particular transaction and has found that its effect is to permit Getty to receive more consideration than the ceiling price for its domestic crude. Nothing in the *Shell* case forecloses the agency from concluding that Getty has overcharged for controlled crude transferred pursuant to that transaction.

Section 211.63 provided that, with certain specified exceptions, "all supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973, shall remain in effect for the duration of this program. . . ." Contrary to Getty's contention, this allocation provision did not "preempt" or "override" the agreement between Sohio and Getty during its term, legally or in practice. The purpose of Section 211.63 was to preserve supplier/purchaser relationships and it did not foreclose Sohio and Getty from continuing to perform after January 15, 1974 in accordance with the terms of their 1973 agreement, assuming that performance had otherwise been lawful. This is precisely what they did and Getty received the same consideration for its domestic oil before January 15th as after. Assuming that Section 211.63 might have altered their contractual relationships had Sohio attempted to terminate the foreign agreement, no such effort was made during the violation period. I cannot fault DOE for taking the position that Section 211.63

was not intended to legalize what would otherwise be a ceiling price violation.

B. *The 1972 Agreements.*

Getty challenges OHA's decision and order insofar as it relates to the period from October 1, 1973 to December 31, 1973 on the additional ground that the 1972 agreements in effect during that period were three party agreements. It points out that the 1972 foreign agreement was between Getty and BP Trading while the 1972 domestic agreement was between Getty and Sohio. OHA did not regard this fact as significant because it chose to regard BP Trading and Sohio as a "single firm." According to Getty, there is no support in the record for such a conclusion. I agree.

OHA's conclusion was based primarily upon the fact that BP Trading was a wholly owned subsidiary of British Petroleum and British Petroleum owned a 26% equity interest in Sohio. It noted, in addition, however, that when Getty negotiated with British Petroleum for foreign crude in July 1971, British Petroleum insisted that matching deliveries be made to Sohio.

The conclusion that British Petroleum and Sohio were a single entity during 1972 for the purpose of determining the applicable ceiling price under Subpart D is erroneous as a matter of law and is, in any event, unsupported by substantial evidence. Because the challenged order insofar as it relates to the last three months of 1973 is based upon that conclusion, that order cannot be affirmed in its present form.

The starting point for understanding the definition of "firm" is contained in 10 C.F.R. § 212.31, which states, insofar as is relevant to the case at bar, that the DOE may treat, as a firm:

> (1) A parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls, (2) a parent and its consolidated entities, (3) an unconsolidated entity, or (4) any part of a firm.

39 Fed. Reg. 1924, 1950 (Jan. 15, 1974).

The DOE thus may elect to treat all entities under common control as a single firm; it may, however, choose not to do so. When the DOE has chosen a definition of firm for a particular subpart of its regulations, it has specifically set that forth in its regulations. *See, e.g.*, 10 C.F.R. §§ 212.82 (Subpart E); 212.162 (Subpart K) (1981). The agency has not elected in the context of Subpart D to treat all entities under common control as a single firm. *InterNorth, Inc. v. DOE*, 548 F. Supp. 987 (D. Del. 1982).

Moreover, even if such an election had been made, the administrative record lacks substantial evidence to support an inference that British Petroleum controlled Sohio in 1973. The sparse record on the point reveals only that British Petroleum owned a 26% equity interest in Sohio and that British Petroleum wished Getty to sell domestic oil to Sohio, a desire which is equally consistent with the existence of an equity interest but no control.* In reality, what the agency has done is to assume control based on the British Petroleum's 26% stock interest. The agency itself has in the past recognized that this is an unsatisfactory basis for resolving an issue of corporate control. *Commonwealth Oil Refining Co.*, Interpretation No. 1977-45, 43 Fed. Reg. 1480 (Jan. 10, 1978).

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* Nor can an inference of British Petroleum control be drawn from the letter of July 30, 1971, a document advanced in the briefing as supporting such an inference, though not relied upon by the OHA.

III. THE VALUE OF THE FOREIGN OIL ISSUE

To measure the value of the foreign crude received by Getty, the DOE used transfer prices determined pursuant to 10 C.F.R. § 212.84. Getty maintains that the administrative record fails to demonstrate that this was an appropriate method of measuring that value and that it was denied access to sufficient data to enable it to meaningfully challenge the accuracy of the values used.

DOE and its predecessor FEA published an index of crude oil representative transfer prices in the Federal Register periodically before decontrol. *E.g.* 40 Fed. Reg. 27059 (June 26, 1975). Data underlying the representative transfer prices were derived from monthly reports of actual market prices supplied to the agency pursuant to 10 C.F.R. § 212.84(e) by every refiner importing at least 500,000 barrels of crude oil and every refiner importing crude oil from an affiliated entity. Representative transfer prices were thus derived from actual price data through calculations [set forth at 10 C.F.R. § 212.83 (e) and (f)] designed to approximate actual prices which would have been charged for those crudes in arms-length transactions.

As FEA detailed in its notices of proposed rulemaking, the basic purpose underlying the establishment of the transfer price program was to provide a regulatory mechanism which could be used to attribute a reasonable value to imported crude oil purchased from a foreign affiliate of a domestic refiner that would approximate the value of the crude oil in an arms-length transaction. This was necessary because under FEA's refiner price rules, the maximum lawful price of a refined product was directly proportional to a refiner's increased crude oil costs. 10 C.F.R. § 212.82 *et seq.* Thus, without some mechanism by which to measure the reasonableness of a refiner's reported "cost" of imported crude oil purchased from an affiliate, refiners could have frustrated the anti-infla-

tionary objectives of the EPAA by the simple expedient of having the affiliate "sell" the imported crude oil to the domestic refiner at a greatly inflated price. Accordingly, FEA determined that:

> the actual cost of covered product (i.e. crude oil) to a U.S. affiliate in a transaction with a related entity should be established at the price which would obtain *if the product had been purchased in an arms-length transaction.*

39 Fed. Reg. 32310 (September 5, 1974) (emphasis added).

Under transfer price regulations, FEA required companies to report "all crude oil purchases and sales by any affiliate of each company." *Id.* From this data base, which was reported to FEA on its 701 forms, FEA calculated for each month and each crude oil type a "representative" and a "maximum" arms-length price. The representative price was the lowest price at or below which 50 percent (by volume) of the reported arms-length sales occurred and the maximum price was a price ten cents higher than the representative price or the lowest price at or below which 65 percent of the reported arms-length sales occurred, whichever was higher. If a refiner's reported cost of crude oil imported from a foreign affiliate exceeded the maximum arms-length price, FEA disallowed all costs in excess of the representative arms-length price. 10 C.F.R. § 212.84(d), 39 Fed. Reg. 38366 (October 21, 1974).

The FEA, which adopted the definition of representative prices, explained the rationale behind the transfer price index as follows:

> To determine the representative price, FEA has chosen a measure which takes account of all arms-length transactions reported to it regardless of their nature. The market is, of course, composed of not one but many prices, particularly when the general

> level of prices is changing rapidly as it has this last year. In deciding what price to choose from those reported, FEA has selected the median because it reflects the middle level of all prices in the market, and although it takes account of all transactions, the median, unlike a weighted average, is not unduly affected from month-to-month by particular transactions at either the high or low end of the pricing range or by the particular mix of transactions reported to FEA. The median also should avoid the sharp monthly fluctuations which would occur if one used simply spot or short-term prices. On the other hand, it should not result in a price excessively dependent upon those contained in long-term contracts entered into several years ago which, notwithstanding escalator provisions for increases in government take, may not reflect the full range of arms-length prices prevailing between unaffiliated entities.

39 Fed. Reg. 32310, 32311 (September 5, 1974).

Thus, contrary to Getty's allegations, DOE's transfer prices are intended to reflect the "value" of foreign crude oil generally prevailing in arms-length transactions. Consistent with this purpose, FEA excluded exchanges from the data base because the "nature of exchanges is such that a wide variety of formal prices may be attached to the exchange without affecting its substance." 39 Fed. Reg. 32310, 32312 (Sept. 5, 1974). And, although the volumes of "spot market" sales are reflected in the transfer price calculations, they merely affect the size of the data base; the prices in such sales are not weight-averaged into the actual price calculation itself.

Finally, Getty's allegation that the transfer price data base excludes transactions where the foreign crude oil is not imported into the United States is in error. In fact, the data base includes all reported arms-length sales

whether or not the crude oil is imported. 39 Fed. Reg. 32310.11 (September 5, 1974).

The foregoing regulatory background of the transfer price index made it unnecessary that an affidavit be included in the administrative record of this case explaining the methodology behind it, and establishes that it was not an arbitrary and capricious measure of the value of the foreign oil. Like other indices based on compilations of market activity it provided substantial evidence of value. *See* Section 2-724 of the Uniform Commercial Code; 28 U.S.C. § 1732 and Federal Rule of Evidence 803(8). No other competing measure of value was advanced by Getty.

The DOE's decision, having elected to utilize this index, to use "maximum price" during the first twelve months of the violation period, rather than representative price, is far less understandable, however, and cannot be sustained. The explanation offered for this decision in the briefing, though not in the October 7th Decision, is that the maximum price during the period was "lower than other objective measures" and that their use resulted in Getty being treated "the same as all other companies subject to FEA's transfer price regulations." However, OHA adopted the transfer price index as the measure of value, not "other objective measures", and there must be some rational basis in the record for the use of the maximum rather than the representative price. Moreover, "all other companies subject to FEA's transfer price regulations" were being benefited by the use of the maximum price; they were not having alleged overcharges substantially augmented by its use.

During the administrative proceeding, Getty was provided with a representative sample of the computer summaries of the transfer price data * that were used to

* No computer summaries are in the record for November, 1974 to May, 1975 because the prices for those months had already

compute the overcharge. A.R. 1022-1105. Getty asserts that there is no substantial evidence to support the transfer prices because FEA did not give it the 701 forms which underlie the transfer price summaries. Getty asserts that it had a right to the 701 forms in the administrative proceeding in order to evaluate the reliability of the representative transfer pricing data used by OHA. While I agree that Getty had a right, upon request, to the data reflected on these forms, Getty never asked for the 701 transfer pricing forms below. Instead, Getty sought only the documents relied upon by the agency in assigning transfer price values to the foreign crude oil. A.R. 265. Accordingly, DOE's Compliance Office provided Getty with the transfer pricing summaries it had relied upon with company names deleted.* After Getty was given transfer pricing summaries, it did not ask FEA to provide the underlying 701 forms.** Nor

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been published in the Federal Register by the time OHA needed them to calculate Getty's overcharges prior to its October 7, 1977 Order. 42 Fed. Reg. 22190 (May 2, 1977). The prices for the period October 1973 to October 1974, had not been published when the R.O. was issued, so during the administrative proceeding OHA placed in the record (at Getty's insistence) the computer summaries for this period. A.R. 1022-1105. For the period May 1975, through January 1976, published transfer prices did not exist when OHA's decision was issued, so the computer summaries that are in DOE's Supplement To Administrative Record were placed in the administrative record.

* OHA directed that the requested transfer pricing data be submitted without information identifying the submitting firm because the information was confidential proprietary data and release might violate 18 U.S.C. § 1905. Decision and Order, Apr. 18, 1977. A.R. 920.

** After it received the transfer price computer summaries, Getty lodged a wide variety of general objections, A.R. 1267-71, but filed neither a motion to compel nor a request for the 701 forms. Nor did Getty allege that its request had been misread. Getty was fully aware that there were such forms because Getty itself filed 701 forms.

did Getty request information about the summaries from the relevant agency official, even though Getty was specifically invited to do so. A.R. 1022, 1289. Nor did Getty seek to introduce any rebuttal evidence. Getty's failure to pursue the remedies available to it below bars any claim of a denial of due process in this Court. *Amtel, Inc. v. FEA*, 536 F.2d 1378, 1382 (TECA 1976); *Bonnaffons v. DOE*, 646 F.2d 548 (TECA 1979).

It should be noted that Getty did have the opportunity to review a representative sample of the transfer pricing data during the administrative proceeding, and to comment on it, both in written and oral form, and it did so. A.R. 1267-84.

IV. OTHER ISSUES RELATING TO THE CALCULATION OF THE OVERCHARGES.

In determining the amount of Getty's overcharge, OHA compared the value of the price-exempt foreign crude oil with the ceiling price of the domestic old oil given up by Getty in return for that foreign crude oil. In Table A of OHA's Decision and Order, OHA set forth the barrels of domestic old oil transferred to Sohio by Getty and the prices charged per barrel (which were the same as the ceiling price) for each month of the violation period. A.R. 1354. In Table B of the Decision and Order, OHA set forth the barrels of the two grades of foreign crude oil received by Getty and the transfer prices used by OHA to value them for each month of the violation period. A.R. 1355. In Table C of the Decision and Order, OHA set forth, in tabular form, the results of comparing the weighted average transfer price values of the foreign crude oil with the ceiling prices of the domestic crude oil. Table C sets forth the resulting overcharge for each month of the violation period and the total overcharge for the violation period.

Getty alleges that there is no record basis for the domestic prices utilized by OHA for five months or for the

domestic or foreign volumes utilized by it the last three months of 1973. The DOE has declared its willingness to accept Getty's data on these matters and an appropriate adjustment will be made on remand.

Getty's primary attack on the calculation of overcharges focuses on OHA's determination of the volume of each grade of foreign oil that Getty received from Sohio during the last fifteen months of the violation period. Getty asserts that the OHA cannot rely on Table B's foreign crude oil figures for the period because the data were submitted by Sohio and Getty had no opportunity to challenge it by way of comment or rebuttal evidence.

It is undisputed that Getty did not have access to Sohio data on the volume of foreign oil transferred to Getty during this fifteen month period. While the DOE described Sohio data as confidential, it clearly was not confidential as to Getty. Moreover, while the DOE points out that Getty did not seek access to this data before the agency, prior to OHA's Decision and Order, Getty had no reason to believe that it was charged with overcharging during this fifteen month period. At the Remedial Order stage, as contrasted with the NOPV stage, the DOE was claiming that Getty had been guilty of overcharge violations from October of 1973 to October of 1974 and of violations of the entitlement program regulations between November 1974 and February 1976. It was for this reason that the Sohio volume data were never referred to or considered by the agency until OHA, while having the case under advisement, expanded the period of overcharge violations and secured the Sohio volume data in order to determine the amount of the overcharge in the last fifteen months.

Finally, the DOE argues that there is data available from Getty which suggests that the Sohio volume data is reliable and, if anything, slightly on the low side. However, this data was not before the agency, was not ana-

lyzed or accepted by it, and can't be used to retroactively supply substantial evidence to support the agency's order.

When the DOE orders the payment of restitution for overcharges and penalties, that action must be supported by substantial evidence. This means more than that there must be some evidence in the record to support the agency. As Judge Wilkie explained in *Mobil Oil Corporation v. FPC*, 483 F.2d 1238, 1258 (D.C. Cir. 1973):

> From this outline of the meaning of "substantial evidence," we can perceive the sort of procedures required. Clearly some evidence supporting the FPC's finding must be in the record. *More importantly for our purposes, the rule that the "whole record" be considered—both evidence for and against—means that the procedures must provide some mechanism for interested parties to introduce adverse evidence and criticize evidence introduced by others.* This process of introduction and criticism helps assure that the factual basis of the [agency's decision] will be accurate and provides the reviewing court with a record from which it can determine if the agency has properly exercised its discretion.

In this matter, the Sohio foreign oil volume data for the last fifteen months of the violation period was not subjected to any critical testing or probing. Getty should have that opportunity before it is required to pay anything attributable to that period. The administrative record will not support an inference that the failure to provide that opportunity was harmless error.

V. THE HEARING ISSUE.

Getty claims that the OHA's finding of liability with respect to the entire period of the alleged violation lacks substantial evidence because Getty sought and was denied an evidentiary hearing at which it could probe the evidence relied upon by the agency, particularly that supplied by Sohio. This claim is without merit, however.

While it is true, as Getty asserts, that early in the proceeding it "requested that certain Sohio and agency officials be subpoenaed so that [Getty] could confront and cross-examine them as to the nature of the transactions and the basis of the Remedial Order," Getty subsequently withdrew its request. At a conference held on March 30, 1977, the Director of OHA requested Getty to specifically identify those facts relevant to the proceeding which Getty wished to address in an evidentiary hearing. A.R. 869A, 877-883, 1315-1316. Getty responded that it did not need an evidentiary hearing regarding "issues arising solely from the Remedial Order" and did not request one. A.R. 886. Subsequently, with respect to Sohio's affidavits specifically, Getty's attorney stated at one point:

> There were some things in the Sohio affidavits that we dispute . . . We would like to file a short statement of points in [sic] their affidavit. But that again is written and *we don't need a hearing on those things.*

A.R. 957-958 (emphasis added). Because Getty did not seek to cross-examine FEA or Sohio witnesses concerning the substance of the RO, it may not present those issues to this Court for review.*

Even if Getty had requested an evidentiary hearing on the issue of liability, however, one would not have been required. When asked by OHA to identify any disputed issues of fact as to which an evidentiary hearing would be helpful, Getty was unable to do so. It has similarly been unable to do so before this Court. Its briefing speaks of its interest in examining Sohio personnel on

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* Prior to withdrawing its request, Getty had sought an evidentiary hearing on four issues which are no longer relevant. A.R. 887-890. Three of them concerned entitlements and one concerned alleged improper congressional pressure. Getty was not prejudiced by its denial of an evidentiary hearing on these issues. *E.g., Amalgamated Meat Cutters v. Cost of Living Council,* 497 F.2d 1360, 1364 (TECA 1974).

their "intent" in entering the agreements and on their accounting treatment of transfers under those agreements but there is no dispute here about what Getty and Sohio agreed to; there is no ambiguity in the language of the contract which needs to be clarified by parole evidence. The liability issues are legal ones: What is the substance of the contractual arrangements which the parties entered and what should the consequences be given the congressional intent behind the Mandatory Petroleum Pricing Program? The subjective intent of Sohio simply does not assist in resolving those issues and it is apparent from the decision of OHA that the result would have been no different, for example, even if Sohio had reported on and accounted for the transaction in a matter contrary to the position which it took in this proceeding.

VI. THE DISCOVERY ISSUE.

When Getty withdrew its request for an evidentiary hearing, it cited as one of its reasons the failure of OHA to grant it all of the discovery it had sought. Getty renews that argument here, claiming that it was materially prejudiced by the failure of OHA to permit discovery concerning how Sohio viewed its dealing with Getty and to produce the raw data underlying the transfer price index. As I have already indicated, however, Sohio's treatment of those dealings was not material and Getty did not ask for the form 701 data.

VII. THE DUE PROCESS ISSUE.

I have reviewed the record in this case and cannot subscribed to Getty's theory that the proceedings below were fundamentally unfair.

VIII. THE "RESTITUTION" ISSUE.

As earlier noted, OHA found that, due to the cost pass through provisions of the Price Control Program, and after November 1974, the operation of the Entitlements

Program, "the persons adversely affected by the Getty overcharges . . . [could] not be identified by reasonable measure." A.R. 1350. It then concluded as follows:

> We have concluded that Getty should be directed to remit the amount of its overcharges plus interest to the United States Treasury. This is the only remedial action which the DOE can require in this case which will prevent the unjust enrichment of Getty, Sohio or any other refiner, and also achieve the agency's objective of compensating the ultimate victims of Getty's unlawful conduct: the public at large.

Getty does not contest OHA's finding that it is not feasible to trace the overcharges to their ultimate destination; it does, however, challenge the agency's authority to order that it make overcharge repayments to the United States Treasury. Specifically, it charges that OHA's order exceeded its statutory authority and was not authorized by its regulations. I disagree.

It has been held that the DOE has implied statutory authority to issue remedial orders requiring refunds of overcharges. *Bonray Oil Co. v. Department of Energy*, 472 F. Supp. 899 (W.D. Okl. 1978), *aff'd and opinion adopted*, 601 F.2d 1191 (TECA 1979). While acknowledging that "an agency order to refund overcharges is neither specifically authorized nor forbidden in the ESA and the EPAA," the Court concluded that such authority was necessary to the effectuation of "broad purposes of the Congressional mandate in" those statutes. 472 F. Supp. at 903-04.

There is, accordingly, no doubt that OHA could have ordered Getty to refund the overcharges to identified purchasers of petroleum products, if the purchasers who ultimately bore the economic impact of the overcharges could be identified. The remaining question is whether the fact that it is not feasible to identify these victims deprives

the agency of authority to require an overcharger to disgorge his ill-gotten gains. Reference to the statutory objectives from which the implied authority to issue refund orders arises demonstrates that it does not.

The DOE inherited a broad mandate. Section 102 of the DOE Act, 42 U.S.C. § 7102, states that one of the Act's purposes is "to promote the interests of consumers through the provision of an adequate and reliable supply of energy at the lowest reasonable cost." The FEA Act, 15 U.S.C. § 751 *et seq.*, declared among its purposes that of maintaining "fair and reasonable consumer prices" for scarce energy supplies, 15 U.S.C. § 761(a), and directed the Administartor to "prevent unreasonable profits within the various segments of the energy industry." 15 U.S.C. § 764(b)(5). Among the national energy goals set forth in the EPAA, 15 U.S.C. § 751 *et seq.*, is "equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices." 15 U.S.C. § 753(b)(1)(F). In the context of preventing "unreasonable profits" and "inequitable prices", a distinction between cases in which the victims are identifiable and those in which they are not seems inappropriate. In either case, disgorgement renders it unprofitable to charge above the ceiling price.

Taking this view of its statutory mandate, the FEA adopted Section 205.195(a), 10 C.F.R. § 205.195(a) (1977), which provides not only that a remedial order "may include a direction to make refunds directly to any purchasers of the product involved" but also that it may require the person "to take such other actions as the FEA determines is necessary to eliminate or to compensate for the effects of a violation." The OHA's order in this case is clearly designed to eliminate one of the principle effects of Getty's violations.

There is reason to believe that TECA shares the view that an inability to trace the deleterious effects of an overcharge does not impair the authority of DOE to pre-

vent unjust enrichment. In *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (TECA 1982), *cert. denied* 103 S.Ct. 172, it observed:

> Actions by the United States under ESA § 209 are taken to enforce public, not private, rights. Thus, compensation is "a by-product of the agency's effort to re-establish compliance with its regulatory scheme." Bulzan, supra at 282. The central purpose of restitution is to determine the amount by which the wrongdoer has been unjustly enriched, and then to make him disgorge that amount. No proof is required that the plaintiff was damaged, much less the amount of any damage:
>
> > Restitution is generally awarded only in order to deprive the defendant of enrichment obtained at the plaintiff's expense . . . the general requirement does not mean that the gain to the defendant need be equated to the loss of the plaintiff, nor indeed that there need be any loss to the plaintiff except in the sense that a legally protected interest has been invaded.
>
> Restatement of Restitution, Sec. 1, Comment e (1937) cited in Sauder v. Doe, 648 F.2d 1341 (TECA 1981).

669 F.2d at 722-23.

Nor am I able to conclude that the agency abused its discretion in requiring Getty to pay the overcharges into the Treasury.

IX. THE INTEREST ISSUE.

In *Bonray Oil Co. v. DOE*, *supra*, TECA specifically upheld the agency's authority to assess interest as part of its inherent authority to effectuate restitution. Getty attempts to distinguish *Bonray* on the grounds that it involved payment to overcharged parties, not refunds to

the Treasury, but this is a distinction without a difference. DOE's remedial authority is restitutionary in nature. *Citronelle-Mobile Gathering, Inc. v. Edwards, supra*, 669 F.2d at 722. Thus, the amount owed is measured by the amount by which the wrongdoer is unjustly enriched, which includes the value of the beneficial use of the money prior to disgorgement.

Getty also contends that the rates of interest applied to it should have been promulgated in accordance with rulemaking procedures and therefore can not be applied. There is no indication, however, that OHA had a substantive rule regarding interest rates on restitutional remedies. The interest rate appears to be determined on a case-by-case basis following an opportunity for a party charged with a violation to comment about the appropriate rate of interest. In such situations, an agency is not applying an across-the-board rule which requires notice and comment rulemaking. *See Pacific Gas and Electric v. FPC*, 506 F.2d 33 (D.C. Cir. 1974).

X. THE "INADEQUATE RECORD" ISSUE.

Getty has vigorously maintained from the outset of this case that the administrative record certified by the agency to this Court was incomplete. Since there was reason to believe this might be the case, I permitted Getty to take discovery regarding the completeness of the record. That discovery and a number of court rulings on the meaning of "the administrative record", have resulted in supplements to the administrative record being filed by the agency. Despite these supplements, Getty contends that the record remains incomplete.

One must acknowledge the possibility that the administrative record may be incomplete. The agency's record keeping at the time of the proceedings below left much to be desired and we know there are at least a few documents which were before the decisionmakers but did not find their way into the record. One must also acknowl-

edge that it is no longer feasible to reconstruct a perfect record. In these circumstances, I think the relevant question is whether there is any reason to believe there may have been a *material* omission from the record. In this case, I believe the answer is no.

In this context the concept of materiality has two facets. First, a reviewing court must inquire whether there is evidence in the administrative record to support each material finding of the agency. If there is not, whether because the agency had no such evidence or whether such evidence as it had was not included in the administrative record, the agency order cannot be sustained. Even if the record contains support for each material finding, however, one must also inquire whether there is reason to believe the agency was exposed to information not in the record which would cast those findings and the evidence supporting them in a substantially different light. If so, the final agency action should not be sustained despite the presence of record support for the conclusion reached. On the other hand, if one can say with confidence that any suggested omissions are immaterial in light of the issues in the case, the content of the administrative record, and the available information concerning possible gaps in the record, the agency's action should be enforced.

As indicated by the foregoing discussion, this case on its merits * presented the agency with the following issues: (1) did the foreign crude received by Getty constitute a part of the consideration for its domestic crude, (2) what were the volumes of the foreign and domestic crude delivered, (3) what was the value of the foreign

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* Getty raised a claim of improper congressional influence before the agency relying on *Pillsbury Company v. FTC*, 354 F.2d 952 (5th Cir. 1966). This issue is no longer material, however, since the agency gave Getty the remedy to which it would have been entitled had it proven this claim. *See* my Opinion of May 4, 1978.

crude, and (4) what should the remedy be. I find no reason to believe that any information relevant to these issues was omitted from the administrative record. I will comment on only two of Getty's arguments to the contrary.

Getty suggests that the decisionmakers considered documents from its compliance and investigation files which are not in the record and that this is important because those files may establish whether or not Sohio treated the value of the foreign oil as a part of its cost as asserted in the October 7th Decision. I have already found, however, that the most likely inference is that the decisionmakers did not consider documents from these files other than those which are in the administrative record. More important, it would not be legally material if they had. While it is true that the October 7th Decision finds, based on a presentation by Sohio, that it booked the transaction in a particular manner, as previously indicated, I think it apparent that the decision would have been no different without that finding. After all, OHA determined that the foreign oil was consideration for the domestic despite the fact that Getty did *not* treat the foreign oil as part of the consideration for the domestic oil which it delivered. The import of the decision was that the legal effect of the Getty-Sohio dealings were determined by the economic effect of the terms they agreed upon.

Getty's position with respect to transfer pricing data is more tenable, but nevertheless unpersuasive. As earlier noted, the administrative record affirmatively reflects that OHA used the transfer price index formulated by the FEA pursuant to 10 C.F.R. § 212.84 to calculate Getty's overcharges. Prior to its decision, FEA had published transfer prices for the months of October 1973 through May 1975 in the Federal Register. Transfer prices for the period June 1975 through January 1976 had not been so published and OHA used transfer pricing

computer summaries to get the figures for those months.* These summaries were not a part of the record as originally certified, but were later included pursuant to order of this Court. Getty continued to insist, however, that the administrative record should contain the Form 701's filed by the reporting companies which reflect the raw data from which the FEA transfer pricing index is derived. While I am inclined to the view that OHA can utilize an appropriate index maintained by a public agency without including in the administrative record the underlying raw data which it did not consult, I agreed with Getty that it should have the opportunity to verify the index figures if it wished to do so and I ordered the agency to supply that raw data. Having had access to this data, however, Getty is unable to point out any significant error in the figures utilized by OHA.

In summary, there may have been documents considered by the decisionmakers which are not in the administrative record as it currently exists. Nevertheless, except to the extent noted elsewhere in this opinion, that record provides support for the findings of OHA and, despite extensive discovery by Getty in this Court, there is no reason to believe that there is any omitted data which would cast those findings in a significantly different light. In these circumstances, a dispute about the completeness of the record does not, per se, bar summary judgment in favor of the agency.

XI. MISCELLANEOUS ISSUES.

It follows from the views heretofore expressed that the remaining contentions of Getty cannot be sustained. Specifically, the October 7th Decision's interpretation of the term "price" did not constitute rulemaking and did not require notice and opportunity for comment. OHA's use of the transfer price index similarly did not require no-

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* The data was later published in 44 Fed. Reg. 30721 (May 29, 1979).

tice and comment rulemaking. The same is true of the decision to require restitution to the United States Treasury.

Moreover, the October 7th Decision did not render Getty liable for the conduct of Sohio and it is not true that it was deprived of the ability to conform its own conduct to the requirements of the law.

XII. CONCLUSION.

Getty's multitudinous attacks on OHA's October 7th Decision and Orders are without merit for the most part. OHA acted within its authority in determining that the value of the foreign oil received by Getty under the 1973 contracts was part of the consideration or "price" which it received for its domestic oil and, accordingly, that there had been a ceiling price violation. Under the circumstances which confronted it, OHA, in devising a remedy, likewise acted within its authority in ordering payment of the overcharges to the United States Treasury.

The October 7th Order, however, includes amounts attributable to OHA findings which were not supported by substantial evidence. Those findings relate to the regulatory consequences of the 1972 agreements and to the last fifteen months of the overcharge period. A remand to the agency will be required for proceedings consistent with this opinion. In the course of that remand, the agency will make the adjustments to its calculation of the overcharges that it agreed to during the proceedings before this Court. It may or may not choose to address the issue raised in its second counterclaim.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 77-434-WKS

GETTY OIL COMPANY,
Plaintiff,

v.

DEPARTMENT OF ENERGY, *et al.*,
Defendants,

and

UNITED STATES OF AMERICA,
Counterclaimant.

Charles F. Richards, Jr., Esquire, Richards, Layton & Finger, Wilmington, Delaware; William Simon, Esquire, William E. Wickens, Esquire, Frederick S. Frei, Esquire, Joanne Parsons Underhill, Esquire, Howrey & Simon, Washington, D.C.; C. Lansing Hays, Esquire, David A. Ross, Esquire, Dechert, Price & Rhoads, New York, New York; R. David Copley, Esquire, Robert Hafey, Esquire, Getty Oil Company, Los Angeles, California, Attorneys for Plaintiff.

Joseph J. Farnan, Jr., Esquire, United States Attorney, Wilmington, Delaware; Nancy C. Crisman, Esquire, Larry P. Ellsworth, Esquire, David A. Engels, Esquire, Mark Kreitman, Esquire, O. Ann Horn, Esquire, Barry Sheingold, Esquire, Office of General Counsel, Department of Energy, Washington, D.C., Attorneys for Federal Defendants.

MEMORANDUM OPINION ON REARGUMENT

Wilmington, Delaware

August 16, 1983

Walter K. Stapleton

STAPLETON, District Judge:

Plaintiff has moved for reargument. Its motion will be denied with the following clarifying comments.

I agree with Getty that Count II of the counterclaim was not before me when I decided the cross-motions for summary judgment. Accordingly, there will be further proceedings with respect to that count.

When I issued my original opinion, I had not read *Eastern Airlines, Inc. v. Atlantic Richfield Company*, TECA Docket Nos. 11-2 and 11-3 (June 15, 1983). When one attempts to integrate the teachings of that opinion with those of *Bonray Oil Co. v. DOE*, 472 F. Supp. 899 (W.D. Okla. 1978) (*affirmed and opinion adopted* 601 F.2d 1191 (TECA 1979)), one concludes that prejudgment interest may be awarded on judgments requiring repayment of overcharges, but that such interest should not be awarded when the amount of the overcharges was not reasonably capable of ascertainment prior to the decision in the case. In this case, Getty, of course, knew of the volume of domestic crude oil delivered by it and the volume of foreign crude oil received by it. The market value of the foreign crude was ascertainable with reasonable certainty. As a result, the amount of the overcharges could have been determined by Getty at any time.[1] It failed to do so not because of

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[1] I do not mean to suggest that Getty would have arrived at the exact figure subsequently determined by OHA to be due. As the case cited by TECA in *Eastern Airlines* indicates, it is not necessary that the amount be liquidated, only that it be capable of ascertain-

any difficulty inherent in the calculation, but because it was operating under the legally erroneous view that the foreign crude was not consideration for the domestic crude.

As I indicated in my original opinion, where a regulated party has overcharged because of an error of law, I see no reason why it should not be deprived of all of the benefits it received as a result of its unlawful conduct and the value of the use of the overcharge fund from the time of each overcharge is one of those benefits.

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ment with a reasonable degree of certainty. Such is the case here. A different issue would be presented if Getty had calculated its maximum selling price based on its good faith evaluation of the market value of the foreign crude and this Court were being asked to imposed prejudgment interest on the difference between Getty's evaluation and a higher evaluation found by OHA.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 77-434-WKS

GETTY OIL COMPANY,
Plaintiff,

v.

DEPARTMENT OF ENERGY, *et al.*,
Defendants,

and

UNITED STATES OF AMERICA,
Counterclaimant.

ORDER

THIS 22nd day of August, 1983, for the reasons set forth in the Opinions of July 7, 1983 and August 16, 1983,

IT IS ORDERED:

1. Confirmatory of action heretofore taken by the Court, Count II of the Counterclaim is severed from the plaintiff's claim and Count I of the Counterclaim pursuant to Rule 42(b).

2. At the request of all parties, Count II of the Counterclaim is hereby remanded to the Department of Energy's ("DOE") Office of Hearings and Appeals ("OHA") for such proceedings thereon as it shall deem appropriate.

3. Plaintiff's motion for summary judgment on its claim and on Count I of the Counterclaim is granted and, accordingly:

(1) Paragraphs (2)(1) and (2)(2) of the DOE's Order of October 7, 1977 in Case Numbers FRA-1230 and FEA-1057 are hereby declared to be null, void and unenforceable.

(2) This matter is remanded to the DOE's OHA for such proceedings, if any, consistent with this Court's opinions, as the DOE shall choose to pursue. In any such proceedings, OHA, in its discretion, may choose to receive additional evidence. The DOE shall advise the Court within thirty days whether it intends to conduct further proceedings and, if so, on what schedule it will proceed.

4. The defendants' motion for summary judgment on the Complaint and Count I of the Complaint is denied, provided that such denial shall not be construed to restrict the authority of the defendants in any proceedings on remand which are consistent in procedure and outcome with this Court's opinions.

5. The plaintiff's Motion for Certification under 28 U.S.C. § 1292(b) is denied.*

/s/ Walter K. Stapleton
United States District Judge

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* Assuming, without deciding, that this Order is not a final order under 28 U.S.C. § 1291, the Complaint raises so many issues that certification of the "consideration" issue, upon reflection, would be unlikely to materially advance the ultimate termination of the litigation.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 77-434

GETTY OIL COMPANY,
Plaintiff,

v.

DEPARTMENT OF ENERGY, *et al.*,
Defendants,

and

UNITED STATES OF AMERICA,
Counterclaimant.

FINAL ORDER

This Court has issued an Opinion and Order which concluded that plaintiff Getty Oil Company ("Getty") was liable under Count I of the Government's counterclaim for the period January 1, 1974 through January 31, 1976, but which also concluded that the amounts set forth in the Decision and Order issued October 7, 1977, were not supported by substantial evidence.

This Court remanded this matter to the Department of Energy's ("DOE") Office of Hearings and Appeals ("OHA") for the purpose of calculating prices, volumes, and representative transfer prices for Count I and further remanded Count II of the Counterclaim to the DOE's OHA, said Count having been severed by this Court, and not considered on the merits or briefed by the parties.

The prices and volumes referred to in this Order are no longer in dispute.

Following this Court's Order dated August 22, 1983, DOE gave plaintiffs a new and different set of representative transfer prices, said transfer prices having been in dispute during the course of this litigation.

Getty has now stipulated to such new transfer prices.

Based on the foregoing, it is hereby ordered and adjudged:

1. Final judgment is granted to DOE on its Motion for Summary Judgment for the period January 1, 1974 through January 31, 1976 on the Complaint and Count I of the Counterclaim in the amount of $82,865,898.00, plus interest calculated through September 16, 1983 in the amount of $50,354,396.00, for a total judgment in the amount of $133,220,294.00, plus interest from September 16th to the date of this order.

2. Count II of the Counterclaim having been previously severed remains on remand to the agency for further proceedings consistent with this Court's Opinion.

3. Final judgment is granted to Getty on its Motion for Summary Judgment for the period October 1, 1973 to December 31, 1973 on the Complaint and Count I of the Counterclaim, it being agreed by the parties that such judgment is without prejudice to any further proceedings with respect to that period as Defendants' may chose to pursue.

4. This is a final order as to the complaint and Count I of the Counterclaim.

/s/ Walter K. Stapleton
United States District Judge

Dated: September 20, 1983 at 5:30 p.m.

APPENDIX F

[SEAL]

Attachment A

* The original of this document contains information which is arguably confidential under 18 U.S.C. 1905. Such material has been deleted from this copy.

DEPARTMENT OF ENERGY
Washington, D.C. 20461

[Oct. 7, 1977]

DECISION AND ORDER *

OF THE DEPARTMENT OF ENERGY

Appeals

Names of Petitioners:		Getty Oil Company The Standard Oil Company
Dates of Filing	:	October 5, 1976 November 30, 1976
Case Numbers	:	FRA-1230 FEA-1057

This proceeding involves an Appeal which the Getty Oil Company (Getty) filed on October 5, 1976 from a Remedial Order which the Deputy Assistant Administrator for Compliance of the Federal Energy Administration had issued to the firm on August 12, 1976.*

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* The Getty Appeal was formerly designated as Case No. FEA-0978. The Appeals which are the subject of this Decision and Order were initially filed with the Office of Exceptions and Appeals of the Federal Energy Administration. However, on October 1, 1977, the FEA was merged into the Department of Energy pur-

I. *The Remedial Order and Ancillary Order*

The Remedial Order concerns certain crude oil transactions which took place between Getty and The Standard Oil Company (Sohio) during the period October 1973 through January 1976. According to the Remedial Order, Getty agreed to sell 25,000 barrels per day (BPD) of predominantly old domestic crude oil to Sohio pursuant to the terms of two agreements which the firms had executed. In return, Sohio agreed to sell 25,000 BPD of foreign crude oil to Getty. The domestic crude oil which Sohio received from Getty was processed in Sohio's domestic refineries. The foreign crude oil which Getty received from Sohio was delivered to Getty in the Persian Gulf and was subsequently transferred to a Getty affiliate in Japan.

The Deputy Assistant Administrator for Compliance found that Sohio treated the transactions summarized above as a barrel-for-barrel exchange, and accordingly accounted for the domestic crude oil which it received from Getty at the price at which Sohio acquired the foreign crude oil which it transferred to Getty in the Persian Gulf. The Remedial Order found however Getty had improperly treated the crude oil transactions which occurred pursuant to the two agreements between the firms as independent purchases and sales. According to the Remedial Order, Getty should instead have treated the transactions as an exchange. Consequently, the Remedial Order concluded that the transfer of old crude oil by Getty

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suant to the Department of Energy Organization Act (Pub. L. No. 95-91) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977). The Office of Administrative Review has assumed the responsibilites which had previously been exercised by the FEA Office of Exceptions and Appeals. The Assistant Administrator for Enforcement has assumed the former functions of the FEA Deputy Assistant Administrator for Compliance. The term "DOE" as used in this Decision and Order refers both to the FEA and its successor.

in return for higher-valued foreign crude oil from Sohio during the period October 1973 through October 1974 constituted the charging of a price by Getty for the predominately old crude oil which it delivered to Sohio which was in excess of the ceiling price determined pursuant to 6 CFR 150.354 and 10 CFR 212.73. Under the terms of the Remedial Order, Getty is required to refund to Sohio the difference between the value of the foreign crude oil which it received from Sohio and the applicable ceiling price for the domestic crude oil which Getty transferred to Sohio. The amount of the refund was estimated in the Remedial Order as a very substantial sum.*

As further consequence of Getty's failure to treat the Getty-Sohio crude oil transactions as an exchange, the Remedial Order found that Getty had improperly excluded the 25,000 BPD of old domestic crude oil which it transferred to Sohio from the crude oil receipts which Getty reported to the FEA and which were used by the agency to calculate Getty's obligations under 10 CFR 211.67 (the Old Oil Entitlements Program) during the period November 1974 through January 1976. Based on these findings, the Remedial Order concluded that Getty had understated its old oil receipts by approximately 25,000 BPD and as a result received a very substantial amount * of excess entitlement revenues from the inception of the Program in November 1974 through January 1976.[1] Accordingly, the Remedial Order required Getty to account for the previously unreported old crude oil in the reports which it submits to the FEA under the provisions of 10 CFR 211.66 and 211.67 in equal amounts over a six

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* Getty claims that the amounts of the alleged violations are confidential. *See* 10 CFR 205.9(f).

[1] The Remedial Order noted that beginning with the month of February 1976, Getty has correctly accounted for the Getty-Sohio crude oil transactions as an exchange pursuant to Section 211.67(g) and included the 25,000 BPD of old oil in its crude oil receipts which it reported to the FEA.

month period beginning with the effective date of the Order. In view of the complexities of the issues involved, the Deputy Assistant Administrator for Compliance on his own motion stayed the refund and entitlement provisions of the Remedial Order until the conclusion of the present Getty administrative Appeal.

In order to ensure that the refunds which Getty is required to make to Sohio under the terms of the August 12, 1976 Remedial Order are treated by Sohio as reductions in crude oil costs and thereby passed through to the purchasers of the covered products refined by Sohio from the Getty crude oil, the Deputy Assistant Administrator for Compliance concurrently issued an Ancillary Order to Sohio pursuant to the provisions of 10 CFR 205.195(b). In the Ancillary Order, the Deputy Assistant Administrator directed Sohio to report detailed monthly cost and volume data regarding the domestic crude oil which Sohio received from Getty and the foreign crude oil which Sohio transferred to Getty in the Persian Gulf. The FEA also specified the manner in which Sohio is required to apply the refunds which Getty is required to remit to Sohio under the Remedial Order in calculating Sohio's maximum allowable prices for covered products under the refiner price regulations, 10 CFR, Part 212, Subpart E. Finally, the Ancillary Order directed Sohio to submit a "statement of alternative remedy" which could be implemented in order to pass through the refunds which Getty is required to remit to Sohio under the terms of the Remedial Order.

Sohio filed an Appeal of the Ancillary Order on November 30, 1976. On December 6, 1976, the FEA issued a Decision and Order to Sohio which denied the firm's request that the reporting requirements specified in the Ancillary Order be stayed pending a final determination of the Appeal which Getty submitted from the Remedial Order. *The Standard Oil Co.*, 4 FEA Par. 85,046 (De-

cember 6, 1976) (hereinafter referred to as the Sohio Stay Decision).

II. *Factual Background*

In March 1969, the Sinclair Oil Corporation merged with the Atlantic Richfield Company (Arco). In view of the fact that Arco already had a substantial share of the East Coast market, Sinclair entered into an agreement with the Department of Justice under which it sold its East Coast refining and marketing assets to the BP Oil Corporation (BP Oil). BP Oil was a newly established American subsidiary of The British Petroleum Company Limited, a British corporation, which had been formed for the purpose of entering the domestic petroleum market. Later in 1969, British Petroleum began merger discussions with Sohio which culminated in an arrangement effective January 1, 1970 under which BP Oil became a wholly-owned subsidiary of Sohio and British Petroleum became a major shareholder of Sohio. BP Trading Limited (BP Trading) is a European subsidiary of British Petroleum. For purposes of the Remedial Order and the Ancillary Order which it issued on August 12, 1976, the FEA assumed that BP Trading and Sohio are one firm. Remedial Order at p. 2.[2]

The crude oil sales relationship which led to the Getty violations was conceived several years before the imposition of price controls on domestic crude oil. In 1971, pursuant to a contract between the firms dated December 22, 1970, Getty purchased 8,000 BPD of Iranian Heavy crude oil from Sohio. In the same year Getty purchased considerably greater quantities of foreign crude oils from other suppliers. Most of this foreign crude oil was purchased by Getty for resale to its Japanese affiliate, Mitsubishi Oil Company (Mitsubishi), 48.7 percent of whose capital stock is owned by Getty. During this

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[2] The Remedial Order and Ancillary Order are hereinafter cited as RO and AO, respectively.

same year, 1971, Getty sold to Sohio approximately 33,000 BPD of domestic crude oil for processing in Sohio's inland refineries in Lima and Toledo, Ohio.

By mid-1971, Getty was advised that its other suppliers would discontinue their sales of foreign crude oil to Getty. In order to obtain foreign crude oil for resale to Mitsubishi, Getty contacted British Petroleum, which offered to sell Getty 15,000 BPD of Iranian Light crude oil and 10,000 BPD of Murban crude oil produced in Abu Dhabi, through its subsidiary BP Trading, provided that Getty continue to sell domestic crude oil to Sohio. Accordingly, Getty and Sohio entered into an agreement dated July 30, 1971 providing for the sale by Getty to Sohio of 25,000 BPD of sweet domestic crude oil commencing January 1, 1972 (hereinafter referred to as the 1971 Domestic Agreement). However, by a letter from Getty to Sohio which was also dated July 30, 1971, the 1971 Domestic Agreement was made contingent upon the sale by British Petroleum (through BP Trading) to Getty of 25,000 BPD "of foreign crude oil for a term similar to that covered by the [1971 Domestic] agreement." Exhibit A to Sohio's Comments to the Getty Appeal. The July 30, 1971 letter went on to state that "Should either agreement be terminated as to all or a portion of the crude oils covered by the respective agreement, then the other agreement shall be terminated as to a similar quantity of oil." *Id.* The agreement between BP Trading and Getty for the sale of foreign crude oil was executed in written form on June 26, 1972 (hereinafter referred to as the 1972 Foreign Agreement). Throughout 1972 and 1973, Getty sold Sohio approximately 25,000 BPD of domestic crude oil pursuant to the 1971 Domestic Agreement, and BP Trading sold Getty approximately 25,000 BPD of foreign crude oil under the terms of the 1972 Foreign Agreement.

In a letter to Sohio dated November 15, 1972, Getty gave notice that the 1971 Domestic Agreement was terminated

effective January 1, 1974. BP Trading, in a letter to Getty dated December 6, 1972, reciprocated by cancelling the 1972 Foreign Agreement. The cancellation of the 1972 Foreign Agreement was also effective January 1, 1974.

Among its various business activities, Getty has substantial crude oil production in the State of California, principally in the Kern River field. In 1973 BP Oil, the domestic subsidiary of Sohio, possessed a right to receive approximately — percent of the net profits from the production of hydrocarbons from certain properties in the Kern River field. Prior to 1973, Getty had offered to purchase BP Oil's net profits interest, but its offers had been rejected. In the Spring of 1973, Sohio offered to sell BP Oil's interest in the net profits of the Kern River field properties to Getty for approximately $————. However, Sohio made its offer contingent upon Getty's continuing the 1971 Domestic Agreement with Sohio for a period of three years (through January 1, 1977). During that same period of time Getty evinced an interest in continuing to purchase the same quantity of Iranian Light and Murban crude oils from BP Trading for resale abroad under an extension of the 1972 Foreign Agreement.

As a result of the negotiations which ensued between the firms in the Spring of 1973, Getty and Sohio entered into the two interrelated crude oil agreements which formed the basis of the violations alleged in the Remedial Order and the remedy specified in the Ancillary Order which the FEA issued to the firms on August 12, 1976. These negotiations culminated on May 16, 1973, the date on which Getty purchased BP Oil's net profits interest in the Kern River field properties. Sohio had previously requested that it, rather than BP Trading, be permitted to sell the foreign crude oil to Getty. This arrangement was acceptable to Getty, and as part of the overall transaction which occurred on May 16, 1973, Getty and Sohio on that

date executed a Crude Petroleum Sales Agreement. Under the terms of this document, Sohio agreed to sell to Getty approximately 15,000 BPD of Iranian Light crude oil and approximately 10,000 BPD of Murban crude oil for a three year period from January 1, 1974 through January 1, 1977.[3] Concurrently on May 16, 1973, Getty and Sohio agreed in a separate document to a three year extension of their prior arrangement under the 1971 Domestic Agreement. According to the terms of that document, Getty agreed to continue to sell to Sohio 25,000 BPD of domestic crude oil for a three year period which also extended from January 1, 1974 through January 1, 1977.[4]

Under the terms of the 1973 Domestic Agreement, Getty and Sohio agreed that the price of the domestic crude oil which Getty would sell to Sohio would be determined by the average acquisition costs under certain specified average posted prices applicable to the grades of crude oil involved. In the 1973 Foreign Agreement, the prices of the foreign crude oil were specified to be the price Getty charged Sohio for the domestic crude oil purchased under the 1973 Domestic Agreement, less a differential of $1.77 per barrel for Iranian Light crude oil, and $1.562 per barrel for Murban crude oil. RO at p. 3.

When the 1973 Foreign and Domestic Agreements were executed by Sohio and Getty on May 16 of that year, domestic crude oil was still more expensive than foreign crude oil which was produced by the OPEC nations. The price differentials specified in the 1973 Foreign Agreement were apparently based on the existing differences

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[3] A copy of this agreement, which will be referred to as the 1973 Foreign Agreement, is attached as part of Exhibit "G" to Sohio's Comment to the Getty Appeal.

[4] A copy of this agreement is also included in Exhibit "G" to Sohio's Comment to the Getty Appeal. The July 30, 1971 agreement, as extended by the agreement of May 16, 1973, will be referred to as the 1973 Domestic Agreement.

between the prices that had been charged to Getty by BP Trading for Iranian Light crude oil and Murban crude oil under the 1972 Foreign Agreement, and the prices that had been charged by Getty to Sohio under the 1971 Domestic Agreement for the domestic crude oil which Getty sold to Sohio on May 2, 1973. Getty Appeal, Exhibit "H", Appendix "A", at p. 7.

With respect to volume, paragraph 5 of the 1973 Foreign Agreement requires that "balancing" quantities be delivered under both the 1973 Foreign and Domestic Agreements. Also, if Sohio falls short in its deliveries of foreign crude oil to Getty due to the occurrence of a *force majeure* event, Sohio was obligated to make up the shortfall after the expiration of the 1973 Foreign Agreement by delivering domestic crude oil to Getty of the same grade that was delivered under the 1973 Domestic Agreement. As a result of these contractual provisions, it would appear that the determinations of the volume of crude oil to be delivered under the two 1973 Agreements are expressly tied to one another.

Under paragraph 6 of the 1973 Foreign Agreement, if either party claims that the price of the foreign crude oil is "more or less than its value relative to the price under the [1973 Domestic Agreement]," it may request a price adjustment. However, if Sohio makes such a request and Getty does not agree to it, the 1973 Foreign Agreement gives Sohio the option to cancel the 1973 Foreign Agreement, but it also gives Getty the option to cancel the 1973 Domestic Agreement concurrently.

Paragraph 5 of the 1973 Domestic Agreement also refers to the fact that the 1973 Foreign Agreement between Getty and Sohio was executed concurrently and that the 1973 Domestic Agreement can be terminated only as provided by the provisions of the 1973 Foreign Agreement.

As indicated above, the two 1973 Agreements are therefore expressly related to one another with respect to

price, volume, term and termination. In addition, the record indicates that the 1973 Agreements were executed on the same date, negotiated at the same meetings, and drafted and reviewed together by attorneys for both Getty and Sohio. Sohio's Comments to the Getty Appeal, at p. 5.

During the period covered by the Remedial Order, Getty owned and operated a domestic refinery at Delaware City, Delaware through its wholly-owned subsidiary, Getty Oil Company (Eastern Operations), Inc. (Getty Eastern).[5] However, none of the foreign crude oil which Getty received from Sohio under the 1973 Foreign Agreement was ever imported into the United States or processed in the Getty Eastern Delaware City refinery. Instead, the foreign crude oil which Getty purchased from Sohio was resold abroad by Getty, principally to Mitsubishi.

III. *Regulatory Background*

The two-tier system of price regulation for domestic crude oil originated as part of the Phase IV Petroleum Price Regulations, of the Cost of Living Council (CLC) 6 CFR, Part 150, Subpart L. Those regulations were promulgated in final form on August 17, 1973 and subsequently adopted by the FEA. 38 Fed. Reg. 22538 (August 22, 1973). Prior to their amendment on February 1, 1976, the provisions of 10 CFR, Part 212, Subpart D, generally required crude oil producers to determine the first sale price of domestic crude oil from a particular property in accordance with the "base production control level" (BPCL) for that property, *i.e.*, the total number of barrels of crude oil produced and sold from the property in the same month of 1972. Crude oil production and sale in subsequent months which did not exceed the BPCL ("old oil") was generally subject to the

[5] For a discussion of the subsequent changes in the structure of the parent corporation occasioned by the merger of its domestic subsidiaries, *see Getty Oil Co.*, 5 FEA Par. 87,009 (January 25, 1977).

ceiling price rule set forth in 10 CFR 212.73(a); crude oil production which exceeded the sum of the BPCL and any deficiency which had accumulated ("new oil") could be sold without regard to the ceiling price rule. The "ceiling price" for old oil was determined under CLC and FEA regulations by adding a maximum of $1.35 per barrel (prior to December 17, 1973, a maximum of $0.35 per barrel) to the highest posted price as of 6 a.m., local time, on May 15, 1973 for the particular crude oil involved. 6 CFR 150.353; 10 CFR 212.73(b). Under the terms of this regulatory system, no first transfer for value of old crude oil could be made where the producer received a price in excess of the applicable ceiling price. For a full description of the provisions of Subpart D as they existed prior to February 1, 1976, see *Fred J. Russell*, 2 FEA Par. 83,082 (March 26, 1975).

"Price" is defined in 10 CFR 212.31 as:

> . . . any consideration for the sale of any property or services and includes commissions, dues, fees, margins, rates, charges, tariffs, fares, or premiums, regardless of form.

The regulations which established the Entitlements Program were promulgated by the FEA on November 29, 1974. 39 Fed. Reg. 42246 (December 4, 1974). Prior to its amendments in 41 Fed. Reg. 13899 (April 1, 1976), the provisions of Section 211.66(h) required all refiners to file with the FEA a report certifying the estimated amount of old oil included in the crude oil receipts of that refiner for the immediately preceeding month (including adjustments for prior months) and the volume of crude oil runs to stills for the preceeding month. This information is submitted to the FEA on Form FEA-P102-M-O (Old Oil Entitlements Program—Refiner's Monthly Report). For purposes of the Entitlements Program, the term "crude oil receipts" meant, as to a particular refiner:

. . . the volume of crude oil (i) booked into its refiners in accordance with accounting procedures generally accepted and consistently and historically applied by the refiner concerned, for its own account or for the account of a firm other than a refiner or (ii) if not previously so booked into its refineries, delivered by that refiner for its account to another refiner pursuant to a processing agreement with that other refiner. Crude oil receipts shall not include crude oil received by a refiner for the purpose of processing at its refineries for the account of another refiner. A particular crude oil receipt shall be deemed to have occurred when the related cost is booked into refinery inventory in accordance with the accounting procedures generally accepted and consistently and historically applied by the refiner concerned, whether or not such crude oil has been actually received by that refiner, except that crude oil delivered by one refiner to another refiner pursuant to a processing agreement will be deemed to have been delivered by the delivering refiner to the other refiner when the risk of loss passes to the other refiner under the particular processing agreement or when the crude oil is received at the refinery of the other refiner, whichever occurs first. Crude oil which has been added by a refiner to its inventory and which is thereafter sold or otherwise disposed of without processing for the account of that refiner shall be deducted from its crude oil receipts at the time when the related cost is deducted from refinery inventory in accordance with accounting procedures generally accepted and consistently and historically applied by the refiner concerned. The volume of old crude oil included in a refiner's crude oil receipts shall be evidenced by and consistent with invoices received with respect to such crude oil receipts. 10 CFR 211.62, 39 Fed. Reg. 42246 (December 4, 1974).

Through the reports filed in accordance with Section 211.66(h), the FEA gathers the information necessary to operate the Entitlements Program. The substantive regulations of the Program appear at 10 CFR 211.67. Prior to their amendment on April 1, 1976, Sections 211.67(a) and (b) read as follows:

> For each month, commencing with the month of November 1974, each refiner shall be issued entitlements by the FEA to include in its adjusted crude oil receipts for that month a specific number of barrels of old oil which will result in an old oil supply ratio for that refiner equal to the adjusted national old oil supply ratio for that month, subject to the entitlement adjustment for small refiners set forth in paragraph (e) of this section.
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> * * * *
>
> For each month, commencing with the month of November 1974, each refiner that has been issued fewer entitlements for that month than the number of barrels of old oil included in its adjusted crude oil receipts shall purchase a number of entitlements effective for that month equal to the difference between the number of barrels of old oil included in that refiner's adjusted crude oil receipts for that month and the number of entitlements issued to and retained by that refiner . . . .

Under the terms of Section 211.67 (prior to the April 1, 1976 amendments), each domestic crude oil refiner was issued entitlements for a particular month (beginning in November 1974) based upon that refiner's volume of crude oil runs to stills as reported to the FEA pursuant to Section 211.66(h). An entitlement was defined as the right of a refiner owning the entitlement to include one barrel of old oil in its adjusted crude oil receipts in a particular month. 10 CFR 211.62. Generally, a refiner having volumes of old oil in excess of the national average for that month in its crude oil receipts was required

to purchase entitlements in order to acquire the right to process that excess amount. Similarly, refiners with a monthly volume of old oil lower than the national average were required to sell entitlements to those refiners required to purchase them under the Program.

In order to implement the provisions of Section 211.67, the FEA issues Entitlement Notices on a monthly basis under Section 211.67(i). The Notices specify the entitlement purchase or sale obligation of each refiner and eligible firm for a particular month, based on the information which is reported to the FEA for that month under the provisions of Section 211.66(h). The provisions of Section 211.67(1), now designated as Section 211.67(m), require that entitlement costs and revenues be reflected in the calculations made under the Mandatory Petroleum Price Regulations, 10 CFR, Part 212. These rules generally provide that a firm which is required to purchase entitlements shall include that expense in its cost of crude oil and that a firm which sells entitlements must reduce its cost of crude oil. By this mechanism, the maximum allowable price levels which each refiner calculates under the provisions of the FEA Price Regulations for the covered products which it sells are generally affected by the nature and extent of its obligations under the Entitlements Program. As a result, the objectives of the Entitlements Program are achieved through the equitable distribution of the cost benefits of old oil among domestic refiners and all downstream levels of the product distribution chain including sales to ultimate consumers.

A variety of industry practices involving the disposition of crude oil are taken into consideration in the operation of the Entitlements Program, including exchanges of crude oil which are discussed under Section 211.67(g). Prior to April 1, 1976, Section 211.67(g) stated:

> In any exchange of crude oil in which only quality and location differentials are given effect in the cal-

culation of the exchange ratio, or in any matching purchase and sale transaction which has the same effect as such an exchange, no volumes of old oil shall be deemed to have been transferred. Any volumes of old oil delivered pursuant to any such exchange or transaction shall be considered as having been retained by the refiner that has exchanged away or sold such volume, regardless of the volume of crude oil received or purchased by that refiner in such an exchange or transaction.

Under the provisions of Section 211.67(g) which were in effect prior to the April 1, 1976 amendments, the old oil subject to the exchange is deemed to remain with the firm that has exchanged away the physical volumes of old oil. Thus, the crude oil received by a firm that exchanged away old oil assumes the old oil characteristics of the physical volumes of crude oil which were given up by that firm in the exchange. This rule was intended to require the refiner that enjoyed the competitive benefit associated with its lower acquisition cost of old oil to account for that benefit under the Entitlements Program. RO at p. 14.

On April 1, 1976, the FEA promulgated a "clarifying amendment" to Section 211.67(g). As amended, Section 211.67(g) provides as follows:

(g) *Exchanges of crude oil.* (1) Subject to the provisions of paragraph (a)(3) below, in any exchange of crude oil in which only quality and location differentials are given effect in the calculation of the exchange ratio, or in any matching purchase and sale transaction which has the same effect as such an exchange, no volumes of domestic crude oil shall be deemed to have been transferred. Any volumes of domestic crude oil exchanged away or sold pursuant to any such exchange or matching purchase and sale transaction shall be considered as having been re-

tained by the refiner or other firm that has so exchanged away or sold such volumes, regardless of the volume of crude oil received or purchased by that refiner or other firm in such exchange or transaction.

(2) Subject to the provisions of paragraph (g)(3) below, volumes of domestic crude oil deemed to be retained by refiner under the provisions of paragraph (g)(1) above shall be (i) included in that refiner's crude oil receipts at the time the crude oil acquired pursuant to the related exchange or purchase and sale transaction constitutes a crude oil receipt under § 211.62 of this subpart to that refiner, or (ii) certified as old oil or upper tier crude oil, as the case may be, under the provisions of § 212.131 of Part 212 when the crude oil acquired pursuant to the related exchange or purchase and sale transaction is sold to another firm.

(3) Where a refiner exchanges away or sells volumes of domestic crude oil in an exchange or matching purchase and sale transaction of the type described in paragraph (g)(1) above and receives in exchange or purchases in the transaction foreign crude oil that is delivered and processed outside the United States, that refiner shall include any domestic crude oil so exchanged away or sold by it in its crude oil receipts as of the date that domestic crude oil is so exchanged away or sold.

(4) The provisions of paragraph (g)(1) above shall not apply to transactions involving domestic crude oil which is exchanged away by a firm other than a refiner for foreign crude oil that is not processed in a refinery located in the United States. Any firm other than a refiner that has exchanged away or sold domestic crude oil within the United States pursuant to an exchange transaction in which other crude oil is also transferred outside the United States shall

comply with the certification requirements of § 212.131 of Part 212 as to any volumes of old oil or upper tier crude oil, as the case may be, so exchanged away or sold. Any domestic crude oil delivered to a refiner in the United States pursuant to a transaction of the type described in this paragraph (g)(4) shall be included in the crude oil receipts of the refiner that receives, directly or indirectly through further sales or exchanges, the volumes of domestic crude oil that are the subject of the transaction, as provided in § 211.62 of this subpart.

(5) For purposes of this paragraph (g), "refiner" means any firm that owns, operates or controls the operations of one or more refineries, and includes any entity that is a part of or affiliated with, or that controls or is controlled by (whether directly or indirectly), a refiner. 41 Fed. Reg. 13899 (April 1, 1976).

According to Section 211.67(g) as clarified, when a refiner exchanges away price controlled domestic crude oil and receives in exchange foreign crude oil which is delivered and processed outside the United States, that refiner is deemed to retain that domestic crude oil and is also required to include the related volumes of domestic crude oil in its crude oil receipts during the particular month in which the domestic volumes are exchanged away. Under this rule, a refiner that exchanges away its domestic crude oil for foreign crude oil is clearly responsible for the entitlement liabilities generated by the domestic crude oil as though it had not been transferred in the exchange.

When the Entitlements Program was promulgated on November 29, 1974, the FEA revised its requirements for the certification of domestic crude oil sales to take into account the effects of exchange transactions occurring under the initial version of Section 211.67(g). In Section 212.131(a)(2), the FEA directed that:

> Each seller of domestic crude petroleum . . . shall, with respect to each sale of domestic crude petroleum other than . . . a sale in which no volumes of old crude petroleum are deemed to have been transferred pursuant to Section 211.67(g) of this chapter, certify in writing to the purchaser the amount of old crude petroleum so sold. The certification shall also contain a statement that the price charged for the domestic crude petroleum is no greater than the maximum price permitted . . . . 39 Fed. Reg. 42249 (December 4, 1974).

According to the Remedial Order, the exclusion of crude oil exchange transactions under Section 211.67(g) from the mandatory certification requirements cited above "completes a total plan spanning both price and allocation considerations and demonstrates that the recipient of old crude oil in [an exchange transaction which falls within the purview of] Section 211.67(g) cannot be given a certification that the crude oil is 'old' oil, since the seller is considered still to have that old oil." RO at p. 13.

IV. *Procedural History of the Case*

During the course of 1974 the FEA compliance staff found that Getty was selling 25,000 BPD of domestic crude oil to Sohio and that Sohio was selling 25,000 BPD of foreign oil to Getty under the two 1973 Agreements described above. On October 11, 1974, the Acting Director, Compliance Audit Review Division, Office of Compliance and Enforcement, issued a Notice of Probable Violation (NOPV) to Sohio concerning the Getty-Sohio crude oil transactions. The NOPV alleged that Sohio was improperly accounting for the cost of the crude oil which it received from Getty in violation of the provisions of 10 CFR, Part 212, Subpart E, the price regulations applicable to refiners. However, after considering the response which Sohio submitted to the NOPV, the FEA concluded that contrary to the allegations in the NOPV,

the transactions between Getty and Sohio were or had the effect of being exchanges and had been properly treated by Sohio. On November 4, 1974, the NOPV was therefore rescinded. Subsequent to the rescission of the Sohio NOPV, various FEA officials continued to exchange internal memoranda as to the proper course of action which should be taken with respect to the Getty-Sohio transactions under the 1973 Foreign and Domestic Agreements. Certain of these memoranda are referred to and quoted in a letter dated August 1, 1975 from Senator Edward M. Kennedy, Chairman of the Senate Subcommittee on Administrative Practice and Procedure, to Mr. Frank G. Zarb, former FEA Administrator. The same day, August 1, 1975, Senator Kennedy issued a press release referring to the Subcommittee's "continuing inquiry into FEA's enforcement," and quoting the text of Senator Kennedy's letter to Mr. Zarb. Also on August 1, 1975, the FEA Assistant Administrator for Regulatory Programs issued an NOPV to Getty which alleged that (i) Getty sold old domestic crude oil to Sohio at prices which exceeded the applicable ceiling prices; and (ii) Getty failed to include the volumes of old oil which it sold to Sohio in its calculations and reports of crude oil receipts in violation of the regulations governing the Entitlements Program. Both of the charges in the Getty NOPV related to the manner in which Getty accounted for the crude oil involved in the Getty-Sohio transactions. On August 25, 1975, Getty submitted a written response to the NOPV, and a conference was held between representatives of the FEA and the firm on September 4, 1975 to discuss the NOPV. An additional written response was submitted by Getty on September 10, 1975.[6]

On August 7, 1975, Getty filed a Request for Information under the Freedom of Information Act, 5 U.S.C. 552, as

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[6] The NOPV and all of Getty's written responses are appended to Exhibit "H" to the Getty Appeal. It should also be noted that Getty's August 25, 1975 response to the NOPV is incorporated by reference as part of the statement of facts on p. 2 of the RO.

implemented by the FEA in 10 CFR, Part 202. In its Request, Getty sought copies of documents pertaining to the FEA compliance investigation of the Getty-Sohio transactions, including the documents referred to and described in Senator Kennedy's August 1, 1975 letter. On August 29, 1975, the FEA Information Access Officer issued a determination to Getty denying the firm's August 7 Freedom of Information Request on the grounds that all of the documents sought by Getty were exempt from disclosure under 5 U.S.C. 552(b)(7) as investigatory records compiled for law enforcement purposes.

On October 1, 1975, Getty appealed the adverse determination of the Information Access Officer. In considering the Appeal, the FEA Office of Exceptions and Appeals found that the Information Access Officer had improperly failed to provide a specific explanation as to the particular manner in which the release of the documents in the investigation file would interfere with the enforcement proceedings. However, the FEA determined that many of the documents withheld by the Information Access Officer were nevertheless exempt from disclosure under Section 552(b)(5) of the Act since they were intra-agency memoranda between FEA officials which reflect the agency's group thinking in the process of arriving at policy determinations. The FEA further determined that: (i) the NOPV which was issued to Sohio and a letter rescinding the Sohio NOPV were no longer exempt from disclosure since the FEA's investigation of the matter had been closed; (ii) a reply which Sohio filed with respect to the NOPV and other documents submitted by Sohio in connection with that investigation should also be released after deletion of all portions of the documents which consist of proprietary data; and (iii) another NOPV issued to Sohio and certain correspondence between the FEA and the Senate Subcommittee on Administrative Practice and Procedure should be released since these documents had already been made

available to the public and were therefore in the public domain. Thus, in the Decision which it issued on October 31, 1975, the FEA concluded that Getty's administrative Appeal under the Freedom of Information Act should be denied with respect to the intra-agency memoranda in the file, but should be granted with respect to the NOPVs and other correspondence and documents requested. *Getty Oil Co.*, 2 FEA Par. 80,718 (October 31, 1975).

Another meeting was held between members of the FEA compliance staff and representatives of Getty on April 8, 1976, and an additional written response to the NOPV, including a settlement proposal by Getty, was submitted on April 21, 1976.

Following the issuance of the Remedial Order to Getty on August 12, 1976, the firm on three separate occasions requested and was granted extensions of time in which to complete the submission of its Appeal (Getty perfected that Appeal on October 5, 1976). Meanwhile, on September 22, 1976, Getty served a set of written Interrogatories upon the FEA Deputy Assistant Administrator for Compliance. The Interrogatories requested the FEA Office of Compliance to identify various internal FEA documents relating to the agency's consideration of the Getty-Sohio transactions and to describe their contents. On October 7, 1976, a conference was held between FEA officials and representatives of Getty to discuss the Interrogatories.

Among the arguments in its present Appeal from the Remedial Order, Getty alleges that the August 1, 1975 NOPV and the Remedial Order would not have been issued if the Senate Subcommittee on Administrative Practice and Procedure had not exerted improper pressure on the FEA to find Getty liable for the regulatory violations alleged with respect to the Getty-Sohio transactions. Getty contended that any administrative agency action

which is based even in part on pressures emanating from Congressional sources is invalid under the precedent established in *Pillsbury Co. v. FTC*, 354 F. 2d 952 (5th Cir. 1966). In a related argument, Getty contended that the FEA's refusal to release the documents which it previously requested under the Freedom of Information Act will frustrate Getty's ability to fully understand and prepare a defense to the charges advanced in the Remedial Order. In connection with these arguments, the Interrogatories which Getty addressed to the Deputy Assistant Administrator for Compliance requested two distinct categories of material. The first category consists of information and documents which Getty claims are necessary as a threshold matter to enable the firm within the context of the present administrative Appeal to effectively raise the issue of improper Congressional interference with the FEA adjudicative process. The second category consists of information of a very broad scope which Getty asserts will generally buttress certain arguments which the firm has already raised in defense to the findings reached in the Remedial Order.

In considering the Interrogatories which Getty submitted, the FEA held that under the precedent established in *Petrolane, Inc.*, 2 FEA Par. 80,615 (June 17, 1975), a determination must be made as to whether access to the material which Getty requested is in fact essential to enable the firm to pursue its Appeal effectively. With respect to the information pertaining to Congressional interference, the FEA reviewed the applicable case law and noted that the federal courts have only invoked the *Pillsbury* doctrine in a limited number of situations where the following showing has been made: (i) there has been a final agency action which adversely affects the person seeking judicial review; (ii) the agency's action was based in part on pressures emanating from Congressional sources; and (iii) the agency changed its position in response to the Congressional pressures. Based on a review of the entire record in this proceed-

ing, including the internal FEA files which the Office of Regulatory Programs and Office of General Counsel indicated relate to Getty's allegations of improper Congressional interference, the Office of Exceptions and Appeals concluded that Getty had failed to make a *prima facie* showing of Congressional interference under the *Pillsbury* doctrine. *Getty Oil Co.*, 5 FEA Par. 80,575 (March 16, 1977) (hereinafter referred to as *Getty I*). In the Decision which it issued the FEA found that unlike the *Pillsbury* line of cases, none of the agency actions which Getty alleges were subject to Congressional influence was a final agency action.[7] In addition, the FEA Office of Exceptions and Appeals concluded that no evidence had been presented which indicated that the FEA changed its position in response to Congressional pressures. The FEA therefore determined that Getty could not establish a plausible *Pillsbury* doctrine violation, even if it had the materials which it requested, and therefore that the material sought by Getty's Interrogatories was not essential to enable the firm to pursue its Appeal effectively.

However, in order to avoid even the appearance of improper Congressional influence, the Office of Exceptions and Appeals further determined that any agency officials who participated in any way in the determination that the Remedial Order should be issued shall recuse themselves from any participation in the Decision that the agency ultimately reaches with respect to the Getty Appeal. With respect to the other category of information which Getty requested in its Interrogatories which is unrelated to the issue of Congressional interference, the FEA found that the record in this matter indicates that Getty understands the charges in the Remedial Order and therefore should be able to prepare its defense to

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[7] A Remedial Order is not a final agency action until an appeal has been filed under 10 CFR, Part 205, Subpart H, and an order granting or denying the appeal has been issued. 10 CFR 205.100(b).

those charges on the basis of the material to which it already has access. It was therefore determined that the remainder of the information requested in the Interrogatories and which is exempt from mandatory disclosure under the Freedom of Information Act should not be released to the firm. On March 16, 1977, the request for discovery which Getty submitted in connection with its Appeal was accordingly denied in its entirety. *Getty Oil Co.*, 5 FEA Par. 80,575 (March 16, 1977).

During the course of the Appeal proceedings in this case, the Air Transport Association of America (ATA) had filed a submission in which it requested that it be permitted to intervene in this matter.[8] In considering the Application to Intervene, the FEA found that the domestic scheduled air carriers who are members of the ATA have been affected by the Remedial Order and the Ancillary Order, and will also be affected by the determination reached with respect to the Getty and Sohio Appeals. For example, a number of ATA members purchased kerosene base jet fuel from Sohio during the period covered by the Getty-Sohio compliance proceeding. These carriers were therefore directly subjected to the passthrough of additional costs by Getty's alleged crude oil overcharges. In addition, the nationwide increased cost of crude oil generated by Getty's alleged entitlement violations arguably subjected all ATA members to increased cost passthroughs. The FEA therefore determined that the ATA represents a group of consumers of covered products which have an interest in the final determination of the pending administrative appeals arising out of the Getty-Sohio compliance proceeding. Based on the precedent established in *Consumers Union of United States, Inc.*, 5 FEA Par. 87,014 (February 18, 1977), the FEA concluded that the ATA had made a sufficiently strong showing that intervention on behalf of consumer interests should be granted in the Getty-Sohio

[8] The ATA submission was filed on November 23, 1976.

appellate proceedings to represent opposing points of view, and the request was granted. *Air Transport Ass'n of America*, 5 FEA Par. 87,025 (March 18, 1977).

On March 23, 1977, Getty filed an Application for Modification or Rescission of the March 16 Order (Getty I).[9] In that Application Getty emphasized the importance of obtaining discovery of information and materials which are relevant to its defense to the findings reached in the Remedial Order, since the firm faces a very substantial pecuniary liability in the event that its administrative Appeal is unsuccessful. In addition, Getty requested pursuant to 10 CFR 205.8 that the Director of the Office of Exceptions and Appeals issue subpoenas to certain persons whom the firm proposed to call as witnesses in the event that an evidentiary hearing is held on the merits of its present administrative Appeal.

On March 30, 1977, a conference was convened at the Office of Exceptions and Appeals regarding the present appellate proceedings. The conference was attended by representatives of Getty and Sohio as well as the ATA. The purpose of the conference was to establish the procedure to be followed for a hearing on the merits of the administrative Appeal which Getty filed from the August 12, 1976 Remedial Order described above.[10]

On April 18, 1977, a determination was issued with respect to Getty's request for modification or rescission of the March 16 *Getty I* Order. *Getty Oil Co.*, 5 FEA Par. 87,035 (April 18, 1977) (Getty II). In considering

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[9] The March 23, 1977 Getty Application was designated as Case No. FMR-0095.

[10] *See* Transcript of Proceedings, Appeal of Getty Oil Co., Case No. FRA-1230, March 30, 1977 (hereinafter referred to as "Tr. I"); *see also* March 31, 1977 Telegram from Melvin Goldstein, Director, Office of Exceptions and Appeals, to representatives of Getty, Sohio and the ATA, confirming the agreements reached at the March 30, 1977 Conference.

Getty's request, the FEA reviewed the firm's contentions with respect to the discovery of material relating to the allegations of Congressional interference and found that no showing had been made which would lead to the conclusion that the previous determination concerning that issue should be modified. Because a substantial portion of the material which Getty sought in its Interrogatories pertains to the manner in which the FEA treated other refiners under the regulatory provisions involved in the proceeding, the FEA also reconsidered its previous determination as to the material requested in connection with Getty's selective enforcement claims. After reviewing the record in this matter and applicable federal court decisions, the FEA concluded that Getty failed to show that there were sufficient grounds for believing that its argument of improper selective enforcement would be substantiated. *Id.* at p. 87,108.

Upon a reexamination of the remaining Getty Interrogatories, viz., those pertaining to matters other than Congressional interference and improper selective enforcement, the FEA again concluded that the request was overly broad and that no showing had still been made that responses to the Interrogatories were necessary to enable Getty to prepare an adequate defense. However, at the March 30, 1977 conference, counsel for Getty pointed out that the firm is charged in the Remedial Order with having sold old domestic crude oil to Sohio at prices that exceeded the applicable ceiling prices (the "Ceiling Price Charge"). *Tr. I* at pp. 7-11. The amount of the violation was measured as the difference between the ceiling price and data collected by the FEA regarding the "transfer price" of the types of crude oils involved in the particular months in which Sohio and BP Trading delivered crude oil to Getty in the Persian Gulf. In view of the substantiality of the Ceiling Price Charge specified in the Remedial Order, the fact that "transfer prices" were used to calculate that violation, and in view

of the fact that Getty appears to be unable to effectively challenge the "transfer price" values unless it does have access to the data base and any assumptions which were used to derive those prices, we concluded that the Office of Compliance should be required to furnish certain of the information requested in Interrogatory No. 11.[11] Finally, in view of the determination that the allegations which Getty presented as to (i) improper Congressional interference; and (ii) selective enforcement, would not furnish a basis for granting its Appeal and reversing the Remedial Order, but would only serve to complicate and delay the appellate proceedings, we concluded that those two portions of the Getty Appeal should be dismissed. *Id.* at p. 87,110.

On April 19, 1977, a hearing was convened at the Office of Exceptions and Appeals which was attended by the representatives of Getty, Sohio and the ATA. The purpose of that hearing was to consider Getty's request that an evidentiary (trial-type) hearing be held with respect to the factual assertions identified by the firm in its April 8, 1977 submission,[12] and to afford the parties an additional opportunity to present oral arguments in connection with the determination as to the format of the hearing to be held on the merits of the Getty Appeal.[13]

On May 3, 1977, the FEA issued the third interlocutory Decision and Order with respect to the present Getty administrative Appeal. In that Decision, *Getty Oil Co.*, 5 FEA Par. 87,041 (May 3, 1977) (*Getty III*), the FEA

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[11] Interrogatory No. 11 is reproduced in its entirety in the *Getty II* Decision, *supra* at p. 87,109.

[12] For a background discussion of Getty's April 8, 1977 submission, *see Tr. I* and Mr. Goldstein's March 31, 1977 Telegram, *supra* note 10. *See also Getty Oil Co.*, 5 FEA Par. 87,041 (May 3, 1977).

[13] *See* Transcript of Proceedings, Appeal of Getty Oil Co., Case No. FRA-1230, April 19, 1977 (hereinafter referred to as "Tr. II").

considered Getty's request that an evidentiary hearing be held in connection with its Appeal from the August 12, 1976 Remedial Order. As a preliminary matter, the FEA noted that the hearings which are generally conducted in exceptions and appeals proceedings are described in Section 205.172 of the Administrative Procedures and Sanctions Regulations. Under that provision, hearings are generally convened "solely for the exchange of views incident to a proceeding," and are designed to permit the parties to present oral arguments with respect to the issues of the case as delineated in their formal written submissions. However, the FEA also recognized that Section 205.172 is sufficiently broad to permit a more formal type of hearing to be conducted when necessary to properly adjudicate the facts and issues presented in a particular case.

In order to permit a more precise determination as to the nature of the hearing to be held with respect to Getty's Appeal, the firm was directed in the March 30, 1977 conference discussed above to submit a detailed specification of the particular findings of fact contained in the Remedial Order which it contends are incorrect. Similarly, Getty was directed to identify each other factual assertion which it wishes to establish and which it contends is necessary to support its position that the August 12, 1976 Remedial Order is erroneous and should be rescinded. With respect to each such issue which it identified, Getty was also directed to (i) state its position as to the proper determination which should be reached with respect to the particular matter; and (ii) state the manner in which it proposes to establish the validity of the position which it advances.

When Getty asserted that it can only establish its position through direct testimony at the hearing which was to be held on the Appeal, the firm was also directed to (i) identify each witness whose testimony is required; (ii) state the reasons why the testimony of that witness

is necessary and relevant to establish the position which Getty asserts to be valid; and (iii) state the reasons why the validity of the Getty position cannot be established in a manner other than through the direct questioning of witnesses. Getty subsequently filed a submission (referred to above as Getty's April 8, 1977 submission) in which it stated that it had no further evidence to submit regarding the first category of issues arising solely from the Remedial Order. With respect to the second category of issues, *viz.*, those which do not arise solely from factual determinations reached in the Remedial Order, Getty did identify four alleged issues of fact which it claimed could only be developed through an evidentiary hearing.

Following receipt of the Getty April 8, 1977 submission, the FEA reviewed the entire record of the Getty Appeal to reach a determination as to whether the request for an evidentiary hearing should be granted. In the Decision which it issued, the FEA Office of Exceptions and Appeals noted that where an evidentiary hearing is not specifically required by the statutes or regulations of an administrative agency, the federal courts have held that an evidentiary hearing is not required by due process considerations except when facts are in dispute. In its various filings, Getty had maintained that the possible state of mind of the FEA personnel responsible for the administration of the Entitlements Program raises factual issues with respect to (i) the treatment of crude oil exchanges prior to the effective date of the clarification of Section 211.67(g); (ii) the alleged retroactive application of Section 211.67(g) as clarified; and (iii) the alleged vagueness of that provision as it existed prior to the clarification of April 1, 1976. Based upon its review of the contentions which Getty advanced, the FEA concluded that the firm failed to establish the need for an evidentiary hearing. The issues which Getty identified were found to present questions of law which must

be resolved by examining the language of the regulations themselves, or by reference to official agency actions which relate to the construction placed on those regulations such as rulings, interpretations, forms and the record of the rulemaking proceedings in which the regulations were promulgated.

Furthermore, the state of mind of the FEA officials responsible for the administration of the Entitlements Program was rejected as constituting a permissible subject for inquiry in the context of this case, since no showing had been made by Getty that there was any bad faith or improper behavior on the part of those individuals. The request for an evidentiary hearing which Getty submitted was accordingly denied. *Getty III, supra.*

On May 25, 1977, a hearing was convened at the Office of Exceptions and Appeals which was attended by representatives of Getty, Sohio and the ATA. The purpose of the hearing was to afford Getty and the interested parties an opportunity to present oral arguments on the merits of the Appeal which Getty filed from the August 12, 1976 Remedial Order.[14]

V. *Getty's Contentions on Appeal*

In its Appeal, Getty contends that the Remedial Order is erroneous in fact and in law and is arbitrary and capricious. Specifically, Getty has advanced the following arguments in support of its position that the Remedial Order should be rescinded:

(i) The Remedial Order erroneously treats as exchanges subject to Section 211.67(g) transactions which are instead separate sales and purchases; in the alterna-

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[14] *See* Transcript of Proceedings, Oral Arguments on the Merits of the Appeal Oil Company, Case No. FRA-1230, May 25, 1977 (hereinafter referred to as "Tr. III").

tive Getty contends that even if the transactions may be considered as exchanges, the Getty-Sohio transactions are nevertheless not the type of exchange contemplated by Section 211.67(g);

(ii) Even if the Getty-Sohio transactions were an exchange of the type contemplated by Section 211.67(g), the old crude oil Getty sold to Sohio never became "crude oil receipts" of Getty and Getty was neither required to report that old crude oil as "crude oil receipts" nor to acquire entitlements for it;

(iii) The provisions of Section 211.67(g) that were in effect prior to April 1, 1976 are unconstitutionally vague and ambiguous and cannot be applied to the Getty-Sohio transactions as contended in the Remedial Order.

(iv) The Remedial Order seeks to achieve an unconstitutional result by imposing on Getty on a retroactive basis the requirements stated in Section 211.67(g) as amended on April 1, 1976;

(v) In effect, the Remedial Order seeks to achieve an improper result by supplying terms to Section 211.67(g) that were not in that section of the regulations as in effect at the time of the Getty-Sohio transactions;

(vi) The Remedial Order cannot rely on the instructions to Form FEA-P102-M-O as establishing the intent of Section 211.67(g), because the document cited was not part of Section 211.67(g); in the alternative Getty contends that even if the Form can be considered as indicating the content of Section 211.67(g), it still could not have the force and effect of a regulation because it was not promulgated under the rulemaking procedures of the Administrative Procedure Act (APA);

(vii) The effect of applying Section 211.67(g) to the Getty-Sohio transactions is to unlawfully discriminate against Getty as compared to refiners exchanging domestic crude oil for domestic crude oil;

(viii) The Ceiling Price Charge is based on an erroneous interpretation of the CLC and FEA regulations and of the relevant facts;

(ix) The use of "value" of foreign crude oil as a measure of the price of domestic crude oil in the RO is unconstitutionally vague and ambiguous and deprives Getty of its property without due process of law in violation of the Fifth Amendment to the U.S. Constitution;

(x) In seeking to regulate the price of foreign crude oil, the Remedial Order exceeds the authority of the EPAA and FEA regulations and is accordingly invalid;

(xi) The FEA failed to comply with the APA as to the prices used to determine the "value" of foreign crude oil for purposes of the Ceiling Price Charge specified in the Remedial Order;

(xii) The FEA's delay of more than two years in issuing the Remedial Order has deprived Getty's domestic refining and marketing subsidiaries of an opportunity to pass through the cost of entitlements;

(xiii) The Remedial Order cannot impose an entitlement purchase obligation on Getty for the period between August 31, 1975, and September 29, 1975 since the EPAA was not actually in effect during that period of time; and

(xiv) The remedy specified in the Remedial Order is arbitrary and capricious and should be modified.

VI. *Contentions of Sohio and the ATA*

A. *Sohio*

Sohio has submitted extensive comments and documentary materials concerning the Getty-Sohio transactions, the Remedial Order and the remedy specified in the Ancillary Order. Sohio maintains that the Getty-Sohio transactions which are described in Section II of this

Decision and Order were viewed by both parties as constituting an exchange rather than as unrelated purchase and sales transactions when the 1973 Foreign and Domestic Agreements were negotiated. The firm asserts that the principal reason why two agreements were prepared was "really just a matter of expediency to get the job done within the time schedule established for the closing of the sale of producing interests . . . . and it was never contemplated that this form of accomplishing the desired result had anything to do with the substance of the transaction." Sohio's Comments to the Getty Appeal, at p. 4. In reviewing the 1973 Agreements themselves, Sohio emphasizes that they are by their terms mutually interdependent and constitute parts of a single arrangement. Sohio further states that while the majority of crude oil exchanges may be documented in a single agreement, the use of two documents as in the Getty-Sohio transactions is by no means unique. As an example, Sohio has submitted an exchange agreement between Sohio and the Chevron Oil Company (a subsidiary of The Standard Oil Company of California) which is also documented by the use of two separate agreements. Sohio has also submitted various internal Sohio documents and correspondence between Sohio and Getty which generally supports its position that the parties themselves have viewed the transactions as an exchange.

Although Sohio strongly supports the determination reached in the Remedial Order that the Getty-Sohio transactions should be treated as an exchange, the firm contends that the remedy specified by the FEA in the Ancillary Order is inappropriate, and should not involve Sohio in any way. Sohio observes that according to the manner in which the FEA has applied the provisions of Section 211.67(g) to the Getty-Sohio transactions for the period after November 1, 1974, Getty has been deemed to have retained old oil and therefore has an entitlement obligation. With respect to the Ceiling Price

violation period prior to the inception of the Entitlements Program, Sohio asserts that Getty should also be deemed to have retained 25,000 BPD of domestic crude oil in place of a like quantity of imported crude oil which Getty Eastern processed at the Delaware City refinery. According to Sohio, Getty's allowable cost passthroughs should be adjusted to reflect the inclusion of this quantity of domestic crude oil and any difference that may exist between the passthroughs used by Getty and that calculated by including the cost of the "deemed" domestic crude oil should be refunded to Getty's customers. Sohio takes the position that if the Getty-Sohio transactions constitute an exchange, Sohio has properly accounted for the cost of its crude oil and its customers have suffered no overcharges. Based on its assertion that neither Sohio nor its customers are due any refund from Getty, Sohio claims that it is not properly a party to any remedial action which the FEA may require Getty to undertake as a result of the Getty-Sohio transactions.

B. *The ATA*

In its submissions, the ATA supports the fundamental determinations of the Remedial Order that Getty breached the basic requirements of the FEA regulatory program by disposing of its old domestic crude oil for a consideration that was far in excess of clear regulatory limitations. The ATA also agrees that the injury caused by Getty's violation affected only Sohio customers prior to November 1, 1974, but affected all customers of domestic refineries thereafter.

The ATA does not agree, however, that the change in the injury after November 1, 1974 in any way affected the nature of the Getty violation. Instead, the ATA urges the FEA to adopt a much more simple theory of the case in the present Appeal, and to revise the legal conclusions and the remedy specified in the Remedial Order. According to the ATA, Getty's violation occurred continuously at the producer level and had nothing to

do with the Entitlements Program. In the ATA's view, the Entitlements Program is relevant only as to the proper remedy for the post-November 1, 1974 period and is of no consequence to the Getty violation.

Under the ATA's theory of the case, the Remedial Order is correct in concluding that the Getty-Sohio transactions constitute an exchange in which Getty gave up price-controlled old domestic crude oil to Sohio in return for an equal quantity of foreign crude oil plus a net cash differential. The ATA would also measure the amount of the Getty violation as the difference between the value of the consideration received by Getty and the ceiling price of the old domestic crude oil which it transferred to Sohio. According to the Remedial Order, during the period that occurred prior to November 1, 1974, Getty's violation resulted in excess payments from Sohio. The ATA agrees with the Remedial Order that Sohio did not absorb these overcharges. Instead, Sohio booked the domestic crude oil which it obtained from Getty as if Sohio had imported the foreign crude oil which it transferred to Getty and passed through the value of the foreign crude oil. The result was that Sohio's customers lost the benefit of the price-controlled domestic crude oil physically transferred by Getty to Sohio and paid higher product prices as a result of Sohio's exchange accounting.[15]

The ATA claims however that the Remedial Order imprecisely analyzes the nature of the change in the injury occurring after November 1, 1974. According to the ATA, the Remedial Order is correct in perceiving that the cost benefits of Getty's domestic old oil continued to

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[15] Prior to November 1, 1974, Getty's customers derived no benefits from the Getty-Sohio transactions because the Delaware City refinery processed primarily foreign crude oil and Getty Eastern accordingly passed through the costs of that foreign oil in its prices.

be excluded from the regulatory system after the Entitlements Program was implemented. However, the ATA contends that the inception of the Program on November 1, 1974 affected only the ultimate rather than immediate consequences of Getty's violation. If the Getty-Sohio transactions were not an exchange, Sohio would have been required to book Getty's domestic crude oil at ceiling prices from October 1973 until October 1974. After November 1, 1974, Sohio would have also been required to include that old oil in its crude oil receipts which it reported to the FEA for purposes of the Entitlements Program, and the cost benefit of the price-controlled old oil would have been distributed among all domestic refiners including Getty.

According to the ATA's analysis, the fact that the administration of the Entitlements Program would have been *affected* by the elimination of Getty's violation does not mean that Getty committed an entitlements violation. The ATA observes that Getty treated the Getty-Sohio transactions as unrelated purchases and sales at the producer level, whereas the Entitlements Program is directed at refiners. If the transactions are construed as an exchange among producers, Getty could have committed the same violation, *viz.*, giving up old oil in exchange for consideration which grossly exceeded the ceiling price of that old oil, with or without a domestic refinery operation.

Thus, the ATA contends that the injury caused by Getty's violation resulted from the disappearance of approximately 25,000 BPD of price-controlled old oil from the FEA regulatory program during the entire period covered by the Remedial Order, October 1973 through January 1976. Sohio's customers were uniquely affected prior to the Entitlements Program, and all consumers were affected after November 1, 1974. The ATA takes the position that no refiner was ever affected by the disappearance of old oil from the system, since all re-

finers were continually able to pass through the excess costs generated by Getty's violation.[16]

There is an additional element of the Getty-Sohio transactions which the ATA claims the Remedial Order ignores altogether—the per-barrel differentials specified in the 1973 Foreign Agreement for calculating the price of the foreign crude oil which Sohio transferred to Getty. The ATA contends that the consideration furnished to Getty by Sohio was partially in cash (the $1.77 per barrel Iranian Light differential and the $1.562 per barrel Murban differential). The ATA maintains that the net cash transfer of the differential amounts was "clearly designed to permit Getty to achieve the full (uncontrolled) value of its domestic crude oil despite delivery of the exchange product in a less favorable location." Preliminary Views of Intervenor ATA, at p. 10. The ATA asserts that Getty bargained for the cash discounts under the 1973 Foreign Agreement as carefully as it bargained for the foreign oil, and that the renegotiation and termination clause under the 1973 Foreign Agreement is directed at the net cash differential rather than the crude oil exchange. Thus, according to the ATA's analysis the full amount by which Getty exceeded the ceiling price in 10 CFR 212.73 must be the sum of the FEA's Section 212.84 f.o.b. transfer price valuation (*i.e.*, the value of the foreign crude oil where Getty received it) and the net cash differential, less the appli-

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[16] The ATA's position in this regard conflicts with that which Exxon Company, U.S.A. advanced in a series of Appeals which it filed from the FEA Entitlement Notices over a period of several months. *See, e.g., Exxon Co., U.S.A.*, 5 FEA Par. 80,576 (November 22, 1976) and cases cited therein. Exxon claimed that the disappearance of old oil from the system reduced the national old oil supply ratio and thereby increased the number of entitlements which Exxon was required to purchase. To the extent that market prices for products have been below maximum allowable prices, Exxon (or any other refiner) would not necessarily be able to pass through all of these costs.

cable ceiling price. The ATA contends that the Remedial Order's disregard of the net cash differential permits a substantial windfall to Getty at the expense of consumers. Assuming that Getty's reciprocal transfers under the exchange are at the rate of 25,000 BPD, and the average differential for the foreign crude oil is $1.65 per barrel, the amount of this alleged windfall to Getty would exceed $13 million per year. The ATA contends that this sum was passed through to consumers on the basis of its assumption that Sohio's valuation of the exchange permitted it to consider the cash differentials as location differentials (*e.g.*, transportation and import license fee costs) which Sohio would have incurred if it had actually imported the foreign crude oil and processed that foreign oil in its Ohio refineries.

On the basis of the foregoing theory, the ATA states that the Remedial Order should be revised in the context of present administrative Appeal. The ATA asserts that the public can only benefit from domestic crude oil price controls when controlled crude oil is booked into domestic refineries for cost passthrough purposes under the FEA price regulations. In the ATA's view, the injury to the public in this case occurred because Getty's action prevented any refiner from booking Getty's domestic crude oil at the controlled price. Thus, the fundamental remedial action which the ATA claims is required for the post-November 1, 1974 period is not a rearrangement of entitlement obligations, but a reinjection of the missing old oil into the cost passthrough system. Under the ATA's theory, the violations by Getty have simply been added to its profits as a crude oil producer, and have resulted in no cost passthrough benefits to its domestic refinery customers. ATA therefore contends that the Remedial Order should be revised to eliminate the opportunity for the passthrough of the benefits which Getty alone received.

With respect to the pre-November 1, 1974 period covered by the Remedial Order, the ATA also questions the

efficacy of the remedy specified in the Ancillary Order. The ATA is concerned that limiting the mandatory refund passthroughs by Sohio to covered products has been undermined by the decontrol of refined products which occurred since the violation period. The ATA also points out the Sohio may well be able to retain a substantial portion of the refunds which it would receive from Getty for the pre-entitlements period under the Remedial Order as a result of product decontrol or by reducing its unrecovered ("banked") costs. Since Sohio has already passed through the additional costs incurred by its treatment of the Getty-Sohio transactions as an exchange, the ATA claims that Sohio would be unjustly enriched under the FEA's proposed remedy.

For these reasons, the ATA suggests a simpler remedy which it claims would better ensure the return of the missing old oil cost benefits to the domestic economy. With respect to this violation which the Remedial Order states occurred prior to the inception of the Entitlements Program, the ATA recommends that the refunds which Getty is required to make to Sohio should be passed through by Sohio on a volumetrically proportional basis to the identifiable customers which Sohio served during that period. For the post-November 1, 1974 period, the ATA suggests that the best way to restore the missing old oil to the entitlements system would be to duplicate the process which would have resulted in the absence of the Getty violation. Under this suggested remedy, Getty would transfer to Sohio the funds which represented its post-November 1, 1974 ceiling price overcharges on a monthly basis. For each month in which it receives those refunds from Getty, Sohio would divide the amount received by the entitlements value for the month in which the overcharge occurred, convert the appropriate quantity of foreign oil to domestic oil for its entitlements reports, and pay the additional entitlements obligations which it would thereby incur with the

refunds received from Getty. In the alternative, the ATA suggests that Getty be required to remit the funds to the FEA, so that the agency would itself adjust the domestic crude oil supply ratio to reflect the missing old oil and purchase the extra entitlements generated by the old oil. The ATA asserts that in either case, all consumers of domestic petroleum products would be assured of an appropriate benefit and Getty customers would not be subjected to an unfair additional burden.

VII. *Analysis*

A. *The Exchange Issue*

In order to reach a determination on the merits of the Getty Appeal, it is necessary as a preliminary matter to resolve the question of whether the Getty-Sohio transactions constitute an exchange. Exchanges of crude oil are a common industry practice which is used principally to increase efficiency and minimize transportation costs when the parties to the exchange each own crude oil and operate refineries which are situated at different locations. For example, where refiner "A" owns crude oil which is produced in California, but operates a refinery which is located in Texas, and refiner "B" owns crude oil which is produced in Texas but owns a refinery which is located in California, it is mutually advantageous for refiner A to exchange its California crude oil for refiner B's Texas crude oil, and *vice versa*. As a result of the exchange, each firm will be able to obtain the crude oil of the other at a location closer to its respective refinery and thereby minimize the transportation costs. There is no authoritative data collected by either government or industry sources regarding the percentage of crude oil processed in the United States which is involved in exchanges, but there appears to be agreement among the parties to this proceeding that the use of such arrangements is quite widespread and involves a significant quantity of crude oil. For accounting purposes, crude

oil exchanges may be handled either as purchases and sales or as exchanges affecting neither purchases nor sales.[17]

For purposes of the present administrative Appeal, the appropriate characterization of the Getty-Sohio transactions must be analyzed on the basis of the dealings of the parties when viewed in the context of underlying principles of the FEA regulatory program. It is therefore important to examine the history of the crude oil transactions between the parties and the circumstances surrounding the negotiation of the 1973 Foreign and Domestic Agreements and the 1973 Agreements themselves. Additional consideration must be given to the subsequent effects of the two-tier price system for domestic crude oil and the OPEC price increases which in October 1973 materially altered one of the basic aspects of the bargain which Getty and Sohio struck in May of that year, and the manner in which the Getty-Sohio transactions affected the administration of the FEA regulatory program following the enactment of the EPAA in November 1973.

At the outset, it is apparent that the basic elements of a crude oil exchange are present with respect to the Getty-Sohio transactions. The record in this matter indicates that the transactions themselves developed as a result of the fact that each of the parties owned crude oil at a location which was geographically distant from the place where it was needed. Sohio owned or had ready access to sour crude oil in the Persian Gulf, but required sweet crude oil for its refineries in Ohio.[18] Getty

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[17] *See* S. Porter, *Petroleum Accounting Practices* at pp. 37, 390, 396-7 (1965).

[18] Crude oil with a sulfur content of more than one percent is considered sour crude oil. The average sulfur content of the foreign crude oil sold by Sohio to Getty exceeded one percent: (15,000 bpd Iranian Light @ 1.4% sulfur) + (10,000 bpd Murban @ .74% sulfur) ÷ 25,000 BPD = 1.14% sulfur.

owned or had access to sweet domestic crude oil, but needed sour crude oil in the Persian Gulf for transfer to its affiliate in Japan. Thus, in July 1971 when Getty sought to purchase foreign crude oil from British Petroleum in order to supply Mitsubishi, British Petroleum was willing to furnish 25,000 BPD of Iranian Light and Murban crude oil to Getty, but only in exchange for the continuing sale by Getty of a matching quantity of domestic crude oil to its affiliated company, Sohio. Under the arrangement that was in effect during 1972 and 1973, each firm bargained for and was able to receive the crude oil of the other at a desirable location.

In the content of the historical dealings between the parties, the 1973 Agreements show a very high degree of accomodation between Getty and Sohio. Both parties had a strong interest in the acquisition of the crude oil of the other, and engaged in extensive negotiation and revision of the terms under which they would transfer their crude oil in exchange for the other's crude oil. As noted above, the provisions of the 1973 Agreements are expressly related to each other with respect to price, volume, term and termination. Furthermore, it is undisputed that they were negotiated at the same meetings, drafted and reviewed together by attorneys for Getty and Sohio, and executed on the same date concurrently with the sale of the Sohio producing interests in the Kern River field to Getty. Although the *substance* of the arrangement between Getty and Sohio contains the elements of a typical crude oil exchange, *viz.*, a mutually advantageous reciprocal transfer of crude oils of different quality at different locations, Getty has focused its arguments to the contrary on the *form* of the arrangement.

Insofar as that position is concerned, we agree with the determination reached in the Remedial Order that there is no merit to Getty's contention that the mere fact that Getty accounted for the transactions as purchases and

sales should be dispositive of the exchange issue. RO at p. 21. As noted in *Petroleum Accounting Practices, supra* note 17, an exchange transaction might be treated in different ways by different firms for different reasons. The Remedial Order is therefore correct in concluding that "the appearance of an entry in a certain account often cannot be evidence of what type of transaction the entry reflects, but only of how the transaction was treated by the firm concerned." RO at 21.[19]

Similarly, we agree with the Remedial Order that there is no validity to Getty's contention that the presence of the two separate 1973 Agreements automatically rules out the simultaneous existence of an exchange. As noted above, most of the essential substantive terms of those two agreements are completely intertwined and related: *e.g.*, price, volume, term and termination. The unrelated aspects of the two 1973 agreements on which Getty places great emphasis do not, as the Remedial Order properly concludes, materially alter the underlying character of the overall integrated transaction between the parties as an exchange. RO at 22. For example, the record indicates that the time of payment for sales of foreign crude oil is customarily 90 days, whereas the time of payment for domestic sales is generally ten days. This factor alone would explain the reason for separate invoicing and cash payments under the terms of the 1973 agreements. We have further concluded that the Remedial Order correctly rejected Getty's contention that the use of different governing law, arbitration and *force majeure* clauses in the two May 16, 1973 Agreements conclusively demonstrates that the agreements "stand alone" and do not constitute parts of a single, integrated commercial arrangement. Like the different times

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[19] As more fully discussed below, the different accounting treatment which Getty and Sohio gave to these transactions actually caused the "disappearance" of the old oil from the coverage of the FEA regulatory program.

of payment for the foreign and domestic crude oil in the 1973 Agreements, these terms are purely formal rather than substantive in character and differ largely as a result of the history of the Getty-Sohio transactions and the fact that delivery of the crude oil involved was to occur at different locations.

In its Appeal, Getty also challenges the determination in the Remedial Order that the two May 16, 1973 Agreements are interrelated to one another with respect to termination. This conclusion in the Remedial Order is based on the following analysis:

> The dependency of these price terms is accompanied by a further accommodation between the parties, namely, the price adjustment clause mentioned earlier. That clause also authorizes termination of the Agreements under certain circumstances involving disparities between the prices and the values of the foreign crude oil relative to the value of the domestic crude oil. If Getty, under the terms of the Foreign Agreement, seeks to adjust the prices it pays for foreign crude oil because of some disparity relative to the prices it charges for its sales of domestic crude oil under the Domestic Agreement, it may, if Sohio declines to agree to the adjustment, terminate the Foreign Agreement. The Domestic Agreement itself may not be terminated except as provided in the Foreign Agreement. That Foreign Agreement further states that if Sohio seeks an adjustment in the prices it receives for the foreign crude oil, because of some disparity relative to the prices it pays for the domestic crude oil, it may, if Getty declines to agree to the adjustment, terminate its sales of the foreign crude oil, but Getty may concurrently terminate its sales of the domestic crude oil. This reflects a significant accommodation between Getty and Sohio, since the prior dealings of the parties authorized mutual, yearly price "re-

> views." The interdependency of the Agreements under this clause demonstrates that Getty's interest in selling domestic crude oil to Sohio is uniquely linked to Sohio's sales of foreign crude oil to Getty. FEA concludes that this nexus is not representative of the chance matching of contracts that may stand alone, but rather constitutes the accommodation described for an exchange. RO at p. 24.

In support of its position that the two 1973 Agreements do not constitute an exchange, Getty emphasizes the fact that termination of either Agreement upon the failure of the parties to arrive at a mutually satisfactory price adjustment is not mandatory, but may be exercised at the option of either party. Getty therefore asserts that one agreement could continue in effect despite the termination of the other. However, we believe that the analysis quoted above from page 24 of the Remedial Order correctly places a greater emphasis on a fact which Getty's argument in this regard ignores—under Paragraph 6 of the 1973 Foreign Agreement, if Sohio elects to terminate the Foreign Agreement because of the failure of a price adjustment which it requests, Getty has the option of terminating the 1973 Domestic Agreement. In view of the history of the previous transactions between the parties pursuant to the 1971 and 1972 Agreements, and the negotiations which led to the simultaneous execution of the 1973 Agreements, it is reasonable to conclude that the termination of either the Foreign or the Domestic Agreement would inevitably have led to the collapse of the entire arrangement. *See* Sohio's Comments to the Getty Appeal at p. 5.

In addition, Getty contends that the analysis of the Remedial Order is faulty because it overlooks the fact that the foreign crude oil sales for the period October 1, 1973 through December 31, 1973 were made pursuant to the June 26, 1972 Foreign Agreement by BP Trading rather than by Sohio. Getty claims that the assumption

in the Remedial Order that BP Trading and Sohio are one firm is not substantiated by the history of their dealings with Getty. Having considered all of the aspects of these relationships, we are not persuaded by the position which Getty has espoused. Section 212.31 of the DOE Price Regulations states that the DOE may treat as a firm:

> (1) A parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls, (2) a parent and its consolidated entities, (3) an unconsolidated entity, or (4) any part of a firm. 39 Fed. Reg. 1924 (January 15, 1974).

The record in this matter indicates that at the time when the 1971 and 1972 Agreements were reached between the parties, British Petroleum owned a 26 percent equity interest in Sohio. Moreover, common control appears to have been exercised over BP Trading and Sohio Petroleum Company, the two entities which sold the foreign crude oil to Getty in exchange for matching sales of domestic oil to Sohio. For example, in July 1971 when Getty negotiated with British Petroleum for the purchase of foreign oil for resale to Mitsubishi, British Petroleum conditioned its sales to Getty on matching deliveries by Getty of the domestic crude oil which was needed at Sohio's Ohio refineries. In 1973, Getty appears to have recognized the fact that British Petroleum and Sohio were acting together as one firm, since it proposed to reinstate the 1972 foreign Agreement with BP Trading, but only on the condition that Sohio would agree to reinstate its agreement to purchase 25,000 BPD of domestic crude oil from Getty. The pattern of dealings between the firms clearly contravenes Getty's claim that there is no basis for the Remedial Order's treatment of the 1973 sales of foreign crude oil from BP Trading as part of the same fundamental arrangement that was covered by the 1973 Foreign and Domestic Agreements.

Getty's final argument that the Getty-Sohio transactions do not constitute an exchange is based on federal court decisions which state that "the very essence of an exchange is the transfer of property between owners, while the mark of a sale is the receipt of cash for the property." *Carlton v. U.S.*, 385 F.2d 238, 242 (5th Cir. 1967); *see also Bell Lines, Inc. v. U.S.*, 480 F.2d 710, 713 (4th Cir. 1973). Since the Getty-Sohio transactions involve the matching purchase and sale of crude oil between the parties, Getty contends that the manner in which the Remedial Order has construed the undefined term "exchange" as encompassing these transactions contravenes the "well established legal principles" articulated by the court in the *Carlton* case. Having reviewed the court decisions which Getty has cited, we have concluded that they are inapposite to the present Getty administrative Appeal. Both of the cases cited by Getty involved actions by taxpayers for the refunds of taxes paid on transactions which the Internal Revenue Service (IRS) had determined did not qualify for nonrecognition treatment as "exchanges solely in kind" under Section 1031 of the Internal Revenue Code of 1954, as amended. The issues which were considered by the courts in those cases did not involve the same type of "exchange" transactions that are the subject of the present administrative Appeal, and the distinction drawn between an exchange and a sale has no valid application outside of the narrow context of Section 1031 of the Internal Revenue Code. It is interesting to note however that the court in *Carlton* also stated that the intention of a taxpayer to avail himself of the advantages of a particular provision of the tax laws does not determine the tax consequences of his action—"what was actually done is determinative of the tax treatment." *Carlton v. U.S., supra* at 243. Similarly, it is necessary to consider the actual consequences of the Getty-Sohio transactions in view of the statutory and regulatory purposes of the FEA program in order to

reach a determination as to the manner in which they should properly be treated.

Based on the foregoing analysis we have concluded that the Getty-Sohio transactions constitute an exchange for purposes of the DOE regulatory program. Getty's argument that they were separate and independent purchases and sales is not supported by the evidence in the case and must therefore be rejected.

B. *The Ceiling Price Issue*

At this point in the analysis of the Getty Appeal, it is important to note that at the time when the May 16, 1973 Foreign and Domestic Agreements were entered into between Getty and Sohio, there were no price controls applicable to the first sale of domestic crude oil at the producer level.[20] Furthermore, the OPEC nations had not yet increased the posted prices of their crude oil to a level which exceeded the price of domestic crude oil. Thus, when the bargain was struck by Getty and Sohio, each firm contemplated receiving the other's crude oil at the generally prevailing market price for the grade of crude oil involved at the location where it was to be transferred. Since the prevailing price of the foreign crude oil at the locations where Getty was to take delivery from Sohio was less than the posted prices of the domestic crude oil where Sohio took delivery from Getty, the per barrel differentials specified in the 1973 Foreign Agreement initially reflected differences in location.

However, two intervening events completely changed the character of the Getty-Sohio transactions. On August 19, 1973, the Cost of Living Council (CLC) promulgated the two-tier price system for crude oil producers and the cost passthrough price regulations for refiners as part of

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[20] For a discussion of the history of domestic petroleum price controls, *see II Historical Working Papers on the Economic Stabilization Program* at pp. 1223-1340 (1974).

its Phase IV regulations. 38 Fed. Reg. 22538 (August 22, 1973), as amended at 38 Fed. Reg. 34896 (December 21, 1973). Beginning in September 1973, the price at which Getty sold its predominantly old domestic crude oil to Sohio under the 1973 Domestic Agreement was governed by the ceiling price rules specified in 6 CFR, Part 150, Subpart L. Concurrently, all domestic refiners (including Sohio and Getty Eastern) were for the first time required to maintain their financial records and calculate their maximum allowable selling prices for covered products under an entirely new regulatory system which was generally designed to restrict price increases to the passthrough of increased crude oil costs. In mid-October 1973, shortly after the value of Getty's domestic crude oil was frozen at applicable May 15, 1973 posted price levels (plus $.35 per barrel prior to December 1973 and $1.35 per barrel thereafter), OPEC increased its crude oil postings by 66 to 70 percent. By January 1974, the world market price of foreign crude oil was generally four times greater than it had been one year earlier. As a result, the value of the foreign crude oil which Sohio sold to Getty increased dramatically relative to the value of the domestic crude oil which Sohio received from Getty under the terms of the agreements between the firms. The data summarized in the following table shows the combined effect of the imposition of the two-tier price system and the OPEC price increase on the Getty-Sohio exchange during the period October 1973 through October 1974.[21]

Once the Getty-Sohio transactions are viewed as an exchange, it is apparent that commencing with the month of October 1973 Getty received foreign crude oil which had a much greater value than the domestic crude oil

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[21] In the Remedial Order, the table which appears below was designated as "Table C." The "weighted average value per barrel received by Getty" is based on transfer price data gathered by the FEA pursuant to 10 CFR 212.84.

TABLE A

Benefit Received by Getty

October 1973-October 1974

	Weighted Average Value per Barrel Received by Getty	Old Crude Oil Ceiling Price	Value Differ-ence	Barrels of Old Oil Sold By Getty	Excess Value Received by Getty
October 1973					
November					
December					
January 1974					
February					
March					
April					
May					
June					
July					
August					
September					
October					
				TOTAL:	$34,847,859

which it transferred to Sohio under the exchange agreements in effect between the firms. The fact that Getty suddenly began to receive a greater benefit than the parties had intended under the Getty-Sohio transactions would have been of no consequence to consumers of domestic petroleum products if the two-tier price system had not been part of an integrated regulatory scheme which also included the refiner cost passthrough price regulations. Under those regulations, the maximum allowable price for sales of an item by a refiner was generally the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus increased product costs incurred between the month of measurement and May 1973. 6 CFR 150.355(g); 10 CFR 212.82(f)(1)(i).[22] "Increased product costs" means the sum of (1) the difference between the total cost of crude oil during the month of measurement and the total cost of crude oil during the month of May 1973 plus (2) the difference between the total cost of petroleum product during the month of measurement and the month of May 1973. 6 CFR 150.356(b); 10 CFR 212.83(b).

However, the record in this matter indicates that when Sohio began calculating its selling prices for covered products under the new Phase IV refiner regulations, it accounted for the Getty-Sohio transactions as an exchange and used the cost of the foreign crude oil sold to Getty under the various agreements, *viz.*, the "value" of what it gave up in the exchange, instead of the applicable controlled price of the domestic crude oil which it obtained in the exchange from Getty. The excess "value" which Getty received in the exchange was therefore

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[22] Citations are to the CLC and FEA regulations which were in effect during the period October 1973 through October 1974. Although the refiner regulations have been amended subsequently, the substance of the basic cost passthrough rule has not been altered.

passed through by Sohio to its customers by the operation of the refiner price regulations.

Consequently, under Sohio's exchange accounting, the cost benefits of the price-controlled domestic crude oil which it obtained in the transactions with Getty were not passed through to consumers of the products refined from the domestic oil.

In contrast to Sohio, Getty accounted for the transactions as independent purchases and sales of crude oil at the producer level of its integrated structure, rather than as a refiner which transferred the cost of the crude oil to its affiliated domestic refinery operations. Thus, even if Getty had properly accounted for the transactions as an exchange, it would never have booked the value of the domestic crude oil which it gave up in the exchange as part of the costs incurred at the Delaware City refinery since the matching barrels of foreign crude oil were transferred abroad to its Japanese affiliate, rather than being imported and processed at its domestic refinery. As a result of the different accounting treatment which Getty gave to the transactions, and its disposition of the foreign oil overseas, the cost benefits related to the old oil which Sohio received escaped the regulatory scheme altogether.

Although it is apparent that during October 1973 and subsequent months Sohio was suddenly incurring a much greater cost for the domestic crude oil than it had initially bargained for in the exchange agreements with Getty, the record in this proceeding indicates that Sohio continued to view the exchange as advantageous in terms of both logistics and economics. Sohio needed sweet crude oil for its refineries in Lima and Toledo, Ohio which was accessible to those locations through available pipeline connections. *Tr. III* at 55. According to Sohio, the exchange with Getty enabled Sohio to obtain a secure domestic source of supply for its sweet crude oil require-

ments at a cost which was less than Sohio would have incurred if it had purchased sweet crude oil overseas and transported it to the United States. *Id.* Consequently, there was no reason for Sohio to resort to the price adjustment provisions in the 1973 Foreign Agreement, and thereby jeopardize the continuation of the 1973 Domestic Agreement.

The arguments which Getty has advanced with respect to the Ceiling Price Charge in the Remedial Order must be considered in the context of the preceeding discussion. As indicated above, once the determination is reached that the Getty-Sohio transactions constitute an exchange for purposes of the DOE regulatory program, the conclusion follows that the commodity received serves as the consideration for the commodity given up. RO at 36. Consequently, the Remedial Order concluded that Getty received foreign crude oil in consideration for giving up its domestic crude oil. As noted above, the value of the consideration which Getty received was far in excess of the controlled value of the domestic oil which it gave up in the exchange. This occurred because the value of the foreign oil which Getty received in the exchange was greater than the ceiling price of the domestic oil. The Remedial Order thus takes the position that the broad definition of the term "price" in Section 212.31 to include "any consideration for the sale of any property . . . regardless of form" readily encompasses the value of the foreign oil which Getty received in exchange for its price-controlled domestic crude oil. RO at 37. Furthermore, the Remedial Order concludes that the fact that Getty received and disposed of the foreign crude oil abroad does not in and of itself remove that side of the Getty-Sohio transactions from the jurisdiction of the FEA regulatory program because the actions of the parties under the Foreign agreements are inextricably bound to and have significant consequences for the reciprocal domestic transactions which are unquestionably

subject to the agency's regulatory authority. *Id.* Finally, the Remedial Order has measured the value of the consideration which Getty received for its domestic oil in the exchange by applying an "objective test" and using the representative transfer price data for Iranian Light and Murban crude oils which it gathered pursuant to 10 CFR 212.84 from reports submitted to the agency on Forms F701-M-O (Transfer Price Report). RO at 38-41.

In its Appeal, Getty contends that the ceiling price charge is erroneous because the Getty-Sohio transactions do not constitute an exchange, but are unrelated purchases and sales. Accordingly, Getty asserts that the value of consideration received for its domestic crude oil should properly be viewed as the controlled prices at which the domestic crude oil was invoiced to Sohio under the domestic agreements. However, this argument that the transactions are not an exchange has already been thoroughly considered and rejected, and no purpose would be served by any further discussion of the exchange issue.

The second error which Getty alleges concerns the definition of the term "price" as including "consideration." Getty claims that Section 212.31 is limited to "commissions, dues, fees, margins, rates, charges, tariffs, fares or premiums," and under ordinary business understanding, cannot encompass the foreign crude oil or the agreements under which it was purchased. This argument has no merit whatsoever, because if Getty's premise were accepted, the DOE price control system could be easily evaded by the disposition of covered products for consideration in kind. For example, firm A could transfer 10 barrels of old domestic crude oil with a per barrel price of $5.00 to firm B in exchange for a ton of coal which has a market value of $100.00. In that hypothetical transaction, it would be absurd for firm A to contend that the coal which it received for its crude oil

did not fall within the scope of Section 212.31 and did not constitute consideration in kind which should be used to determine the value received for the price-controlled crude oil. Since Section 212.31 includes "any consideration" received for a covered product to be the price for regulatory purposes, it is sufficiently broad to encompass the foreign crude oil involved in this case.[23]

Getty next argues that the Ceiling Price Charge is legally unsound because if it were a violation for Getty to charge Sohio a price for domestic crude oil that exceeded the ceiling price on the basis of the value of the foreign crude oil received by Getty in the exchange, it was also a violation of Section 210.62(b) of the FEA regulations for Sohio to have purchased the domestic crude oil at that price. In support of this contention, Getty observes that since Sohio made no protest of that price under Section 210.62(b), Sohio obviously did not consider that the ceiling price regulations had been violated. In a related argument, Getty also points out that although Sohio had the right under Paragraph 6 of the 1973 Foreign Agreement to seek an upward adjustment of the price of the foreign crude oil, Sohio did not do so. According to Getty, this is further evidence of the fact that Sohio considered the price which it paid for the domestic crude oil to be proper.

We are not persuaded by these arguments. Once the Getty-Sohio transactions are viewed as an exchange for purposes of the DOE regulatory program, it is clear that the consideration which Getty received for its domestic oil, *viz.*, matching barrels of foreign oil, had a value which exceeded the ceiling price for the domestic crude

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[23] *Cf. Tenneco Oil Co.*, 5 FEA Par. 80,506 (December 21, 1976), where we held that the receipt of "value" for crude oil which was processed and returned as residual fuel oil for consumption as lease fuel constituted the equivalent of a "sale" for purposes of calculating the BPCL for the property.

oil. The fact that Sohio apparently elected to continue to exchange its foreign crude oil for Getty's domestic crude oil has no bearing whatever on Getty's legal responsibility for its ceiling price violations.

The next series of arguments advanced by Getty in its Appeal concern the Remedial Order's use of transfer price data collected pursuant to Section 212.84 to measure the extent of the ceiling price violation. Getty contends that the use of the "value" of the foreign oil as a measure of price obtained for the domestic crude oil is unconstitutionally vague and ambiguous and deprives Getty of its property without due process of law in violation of the Fifth Amendment to the U.S. Constitution. Getty claims that it could have had no idea whether the consideration which it received for the domestic oil was excessive under the FEA regulations, because even if the transactions should have been viewed as an exchange, the regulations contained no guidance as to the manner in which the "value" of foreign crude oil or the amount of any such excess was to be determined. The firm further contends that in view of the fact that the EPAA does not even purport to regulate the prices of foreign crude oil, and when it is considered that the Remedial Order seeks to measure the amount of the excess value received by reference to prices which were reported to and published by the FEA only in 1975—long after the transactions covered by the ceiling price charge were completed—the "fundamental unfairness of the Ceiling Price Charge is manifest." Getty Brief at 63.

In support of its argument that the Ceiling Price Charge is based on a concept of "value" that is unconstitutionally vague, Getty relies on the decision of the U.S. Supreme Court in *U.S. v. Cohen Grocery Co.*, 255 U.S. 81 (1921). The statute involved in that case prescribed the charging of "any unjust or unreasonable rate or charge in dealing in or with any necessities. . . ." The Court held that

language to be unconstitutionally vague when applied to a sugar dealer, because the appellants "could have had no idea in advance what 'an unreasonable rate' would be. . . ." *U.S. v. Powell*, 423 U.S. 87, 92-93 (1975). However, we have concluded that Getty's reliance on the *Cohen Grocery* case is misplaced. Unlike the nebulous statutory language involved in *Cohen Grocery*, the rule under attack in this case is the ceiling price provision of the crude oil producer regulations. The regulatory provisions in this case are not at all vague or ambiguous, and clearly specify the ceiling price for old domestic crude oil. The ceiling price for old crude oil was determined under the CLC and FEA regulations by adding a maximum of $1.35 per barrel (prior to December 17, 1973, a maximum of $.35 per barrel) to the highest posted price as of 6 a.m., local time, on May 15, 1973 for the particular crude oil involved. 6 CFR 150.353; 10 CFR 212.73(b). The regulations further provided that no first transfer for value of old oil may be made 212.73(a). Getty knew what the ceiling price for its domestic oil was, and was certainly aware of the fact that the value of the matching barrels of foreign oil which it bargained for in exchange for the domestic oil had increased relative to the value of the domestic crude oil. Getty could have foregone the extra measure of consideration which it received for its domestic crude oil by reforming the basic underlying bargain with Sohio. However, Getty did not do so, and continued to receive foreign oil which had a value in excess of the ceiling price for the domestic crude oil. In contrast to *Cohen Grocery*, what the Remedial Order has done is to use the transfer price data to assess the value of the consideration which Getty received for its domestic oil.

The Remedial Order's transfer price methodology is moreover fully consistent with the "reasonable price" approach specified in Section 2-724 of the Uniform Commercial Code (UCC). That Section provides as follows:

§ 2-724. Admissibility of Market Quotations

> Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

The Official Comment to Section 2-724 further states that market quotations are made admissible when the price or value of goods traded "in any established market" is in issue. The rationale of the section "does not require that the market be closely organized in the manner of a produce exchange. It is sufficient if transactions in the commodity are frequent and open enough to make a market established by usage in which one price can be expected to affect another and in which an informed report of the range and trend of prices can be assumed to be reasonably accurate." UCC Section 2-724 (1972 Official Text).

Not only would the transfer price data collected by the FEA [24] be proper to establish the value of the foreign crude oil received by Getty, but representative crude oil prices in commercial publications such as those submitted by the ATA as Appendix A to its Supplemental Memorandum filed on May 23, 1977 would also be acceptable indices of value under UCC Section 2-724.[25]

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[24] The FEA transfer price data would also be admissible under Rule 803(8) of the Federal Rules of Evidence as "public records and reports."

[25] The price data from *The Petroleum Economist* which the ATA submitted would also be admissible under Rule 803(17) of the Federal Rules of Evidence as "market reports" and "commercial publications."

In a related argument, Getty contends that the FEA failed to comply with the rulemaking procedures of the APA in calculating the transfer prices which it used to determine the "value" of the foreign crude oil for purposes of the Ceiling Price Charge. This argument is not supported by the regulatory history of the transfer price system. Section 212.83(b) of the Mandatory Petroleum Price Regulations provides in part that:

> Whenever a firm uses a landed cost which is computed by the use of its customary accounting practices, the FEA may allocate such costs between the affiliated entities if it determines that such allocation is necessary to reflect the actual costs of these entities or the FEA may disallow costs which it determines to be in excess of the proper measurement of costs.

This section was first issued by the CLC as part of an amendment to Section 150.363 of its Phase IV price regulations, 38 Fed. Reg. 25688 (September 12, 1973), and has been continued in effect by the FEA. To establish standards for applying this section and to adopt more definitive regulations in this area, the FEA conducted two proposed rulemaking proceedings which culminated in the promulgation of 10 CFR 212.84 ("Disallowance of Costs"). See 39 Fed. Reg. 17771 (May 20, 1974); 39 Fed. Reg. 32310 (September 5, 1974) and 30 Fed. Reg. 38364 (October 31, 1974). In its proposed rulemakings and in its preamble to Section 212.84, the FEA stated its intent to apply the standards in Section 212.84 as interpretive of "actual costs" and "the proper measurement of costs" as used in Section 212.83(b). In general, the proposed rulemakings attempted to determine what the actual cost of crude oil would have been to the domestic refiner if it had purchased the crude oil in an arms-length transaction. This index of value was used in order to find a transfer price equal to the price which

would have resulted from ordinary market forces. To the extent that it is successfully applied, the arms-length measure was also designed to result in a price designation of crude oil for the purposes of the FEA regulatory program that was as close as possible to the measure of actual costs whether or not the crude oil was purchased from a related party. See 39 Fed. Reg. at 17772. In view of the fact that the FEA conducted a series of rulemakings prior to the adoption of the transfer price valuation system in which the agency promulgated for public comment its proposal for determining the comparable market price for foreign crude oil, we have concluded that the use of these prices in the Remedial Order is proper, and Getty's argument to the contrary must therefore be rejected.

We have also concluded that there is no merit to Getty's argument that the Remedial Order exceeds the statutory and regulatory authority of the FEA by attempting to regulate the price of foreign crude oil. The Remedial Order does not in any way regulate or affect the price charged for foreign crude oil. Rather, the Remedial Order only assesses the extent of the Getty violations by comparing the value of the foreign crude oil to the ceiling price of the domestic crude oil. If Getty's position on this issue were accepted, the entire DOE regulatory program would be open to facile evasion through the use of multinational transactions.

As noted in Section IV of this Decision, the Office of Regulatory Programs of the FEA was ordered on April 18, 1977 to release the data which was used to calculate the transfer price values set forth in Table C to the Remedial Order. *Getty II, supra.* In addition to challenging the propriety of the use of transfer price data in the Remedial Order, Getty has also questioned the factual accuracy of that data, and the sufficiency of the discovery materials which were released pursuant to the

Getty-II Decision. In this regard, Getty contends that its ability to appeal the transfer price data has been impaired by the belated receipt of that information on May 18, 1977. However, despite the fact that the transfer price information was not received by Getty until 15 days after the time specified in the *Getty II* Decision, the firm was subsquently accorded a sufficient period of time in which to review the data supplied and to submit additional written comments in connection with its present administrative appeal. *Tr. III* at 72-76. Getty also contends that the response of the FEA Office of Regulatory Programs to Interrogatory No. 11, in which Getty sought the documents relied on by the FEA in calculating the transfer prices used to determine the value of the foreign crude oil, is insufficient. This contention is without merit. Getty has been furnished with complete copies of the relevant transfer price data which was initially reported to the FEA on Forms F710-M-O, with only the identity of reporting firms omitted. We are not persuaded that Getty is unable to understand the FEA's methodology in calculating representative and maximum prices, in view of the fact that Getty itself reports to the agency on Form F701-M-O and must therefore be familiar with the terminology and format of the reporting system. Since Getty has not submitted any new data which contradicts the accuracy of the transfer price materials that it received pursuant to the April 18, 1977 *Getty II* Decision, we have concluded that the firm has failed to substantiate its position that the transfer price data is factually erroneous.

For the reasons set forth above, we have concluded that the Remedial Order correctly found that Getty violated the ceiling price rules during the entire period October 1973 through January 1976. However, as indicated below, we have also concluded that the Entitlements Charge in the Remedial Order is unnecessary to reach a proper resolution of the Getty compliance proceeding, and that

the conclusions reached with respect to the Entitlements Program in the Remedial Order must be revised.

C. *A Reexamination of the Entitlements Issue*

The fundamental violation in this case occurred when Getty transferred domestic crude oil and in return received a consideration whose value exceeded the applicable ceiling price. It is clear that both before and after the implementation of the Entitlements Program in November 1974 Getty transferred domestic crude oil to Sohio in exchange for matching barrels of foreign crude oil which had a value substantially in excess of the ceiling prices for the domestic oil. The benefits which Getty obtained through these transactions were however attained as a result of the firm's activities as a producer of crude oil. These violations occurred irrespective of the existence of the Entitlements Program since the revenues which Getty improperly obtained were primarily attributable to the sale of crude oil rather than the use of that crude oil in a refinery.

When the Entitlements Program was promulgated in November 1974, a new level of cost distribution was imposed in the overall regulatory system. Prior to November 1974, the FEA's crude oil allocation program ensured the equitable distribution of crude oil feedstock among all domestic refiners. However, as a result of the two-tier price system for crude oil, different refiners found themselves with supplies of crude oil which differed substantially in cost. Refiners which received and processed a greater percentage of price-controlled old domestic crude oil enjoyed a considerable cost advantage over competing firms which were receiving predominantly uncontrolled domestic crude oil and foreign crude oil. In order to remedy this inequitable distribution of the benefits associated with price controls on domestic crude oil, the FEA promulgated the Entitlements Program. As noted above, the Entitlements Program was intended to dis-

tribute the cost advantages of old oil equally among all refiners. Thus, when the Program was implemented in November 1974 the costs of crude oil processed by domestic refiners flowed from the producer to the refiner, then were equalized among refiners through the allocation of the cost benefits of old oil. After the acquisition cost of crude oil was equalized among all refiners, the crude oil costs were passed through to all of the downstream levels of the distribution chain including consumers.

As a result of Sohio's exchange accounting in which it treated the Getty domestic crude oil as foreign crude oil for purposes of the cost passthrough system, the adverse impact of Getty's ceiling price violation was always manifested by the disappearance of the old oil from the FEA regulatory program. But when the Entitlements Program was implemented, the nature of the adverse impact which resulted from Getty's ceiling price violation and consequent disappearance of oil oil changed substantially. Before November 1974, the excess value which Getty received in the exchange for its old oil was passed through by Sohio to its customers; after November 1974 the excess value which Getty received was through the crude oil cost equalization mechanism of the Entitlements Program paid for all by refiners. That excess value was also reflected to a certain extent in higher prices which a number of consumers paid for the products which they purchased.

This result occurred because the disappearance of Getty's old oil from the cost equalization mechanism of the Entitlements Program reduced the national old oil supply ratio by approximately 25,000 BPD. *See Exxon Co., U.S.A., supra* note 16. Consequently, refiners who reported more than the national average precentage of old oil in their crude oil receipts and runs to stills had to purchase a greater number of entitlements in order to process that excess amount of old oil. Similarly, re-

finers with less than the national average percentage of old oil had fewer entitlements to sell. All refiners therefore suffered the impact of Getty's violation in November 1974 and subsequent months. Some of the increased costs were passed through to their customers by the operation of the refiner price regulations. However, as a result of the fact that the maximum allowable price levels which these refiners calculated under the refiner regulations might have been greater than the product price levels which the market would bear, some of the excess costs which they incurred as a result of Getty's violation might have been "banked" and carried forward for recovery in subsequent months. Thus, a refiner which has consistently been a buyer of entitlements since November 1974, and which also carried a substantial "bank" of unrecovered crude oil costs increases might well have been unable to pass through a portion of the excess entitlements which it was required to purchase as the result of the regulatory consequences of the Getty-Sohio transactions. The ultimate impact of Getty's post-November 1974 violations has therefore been widely diffused among refiners who have had to purchase or sell entitlements and, to an unknown extent, the customers who purchased refined products from those firms. However, this "entitlements effect" does not alter the underlying nature of Getty's violation as having transferred old oil to Sohio for consideration that was in excess of the ceiling price.

On the basis of the considerations set forth above, we have determined that the conclusions reached in the Remedial Order must be revised with respect to the Entitlements Charge and the remedy. The Remedial Order correctly perceived the shift in the impact of Getty's ceiling price violations which resulted from Sohio's exchange accounting methods when the Entitlements Program was implemented in November 1974. Once the Entitlements Program was in operation, the Getty violations could be remedied by the reinjection of the missing old oil into

the integrated regulatory system for cost equalization and for cost passthrough purposes. However, it is not necessary to reach the conclusion that Getty violated the provisions of Section 211.67(g) in order to consider the use of the Entitlements Program as a possible conduit through which Getty's crude oil overcharges could be returned to the cost passthrough system.[26] Consequently, we have determined that the ordering paragraphs in the Remedial Order which relate to Getty's violation of the Entitlements Program should be rescinded. As a result of that determination, it is unnecessary to consider Getty's arguments with respect to the Entitlements Charge specified in the Remedial Order.

However, one of the arguments which Getty has addressed to the Entitlements Charge also raises the questions of whether the DOE has the statutory authority to find the firm liable for a Ceiling Price violation during the period August 31, 1975 when the EPAA expired, and September 29, 1975 when the EPAA was extended. As Getty observes in its Brief at page 80, when the EPAA was extended on September 19, 1975 the Congress expressly intended that the price control regulations promulgated under the EPAA be applied retroactively during the period "between August 31, 1975 and the date of enactment of this Act." EPAA of 1975, Section 3 (Pub. L. No. 94-99). Getty contends that contrary to the clear intent of the Congress, to the extent that the Remedial Order imposes any regulatory obligations on the firm during the EPAA hiatus period, it cannot be legally enforced. In the case of *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 420 F. Supp. 162 (S.D. Ala. 1976), the United States District Court for the Southern District of Alabama fully considered and ultimately rejected

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[26] *See Shell Oil Co.*, 3 FEA Par. 80,545 (January 1, 1976) for a discussion of the general principles which govern the design of the particular remedy which a firm is ordered to undertake to correct for previous illegal overcharges.

an identical challenge to the retroactive application of price ceilings on domestic crude oil during the period when the EPAA temporarily expired. The same position was also adopted by the FEA in Ruling 1975-17 ("Application of FEA's Mandatory Petroleum Price and Allocation Regulations During September 1975"), 40 Fed. Reg. 48341 (October 15, 1975), Fed. Energy Guidelines, Par. 16,057. In its present Appeal, Getty has failed to furnish any substantive legal authority which supports its contention that the result reached in the *Citronelle-Mobile* case was incorrect. We have therefore concluded that the holding of the court in *Citronelle-Mobile* is dispositive of Getty's contention regarding the EPAA hiatus period.

D. *The Remedy Issue*

As a prelude to the analysis of the issues involved in the design of an appropriate remedy in this case, it is necessary to review the conclusions reached above. Based on our consideration of the materials which Getty, Sohio and the ATA have submitted in the context of this appeal, and the entire record in this matter including the August 12, 1976 Remedial Order and Ancillary Order, we have concluded that the Getty-Sohio transactions constituted an exchange for purposes of the FEA regulatory program. We have further concluded that the Getty-Sohio transactions constituted an exchange in which Getty received consideration for domestic crude oil which substantially exceeded the applicable ceiling price throughout the period October 1973 through January 1976. As a result of the different manner in which Getty and Sohio accounted for the transactions under the exchange agreements, the old oil which Getty transferred to Sohio was excluded from the FEA regulatory system for both cost passthrough and entitlements purposes. During the period prior to the advent of the Entitlements Program in November 1974, Sohio's customers incurred the added expense which resulted from Getty's overcharges to

Sohio and Sohio's passthroughs of the costs of the foreign crude oil under its exchange accounting treatment of the transactions. In November 1974 and subsequent months, all refiners, and to an unknown extent, their customers, absorbed the additional expenses generated by Getty's violation as a result of the crude oil cost equalization aspect of the Entitlements Program and the refiner cost passthrough regulations.

Before reaching a determination as to the manner in which Getty should be required to make restitution for its overcharges, it is necessary to evaluate the contention raised by the ATA in its submission that the amount of Getty's violation should include the per barrel exchange differentials for Iranian Light and Murban crude oil which are specified in the 1973 Foreign Agreement. As noted in Section IV(B) of this Decision and Order, the ATA's position in this regard is based on its assertion that Sohio treated the cash differentials as if they were transportation costs and added these differentials to the F.O.B. value of the foreign crude oil for cost passthrough purposes under the refiner price regulations. Under this theory, the harm to the domestic economy which resulted from the Getty violations arguably included the per barrel differentials for the foreign crude oil costs which were passed through by Sohio. As the foregoing analysis in this Decision indicates, we affirm the conclusion reached in the Remedial Order that the F.O.B. value of the foreign crude oil minus the ceiling price of the domestic crude oil represents excess consideration which Getty received and should be required to return. However, we are unable to reach a determination in the context of the present administrative appeal as to whether the per barrel differentials should also be included in the calculation of Getty's liability for overcharges. The compliance proceeding which culminated in the issuance of the August 12, 1976 Remedial Order focused on Getty's actions and only considered Sohio's conduct in a peripheral manner. On the basis of the present record,

there is not a sufficient factual basis for the Office of Administrative Review to make any findings and concusions regarding the propriety of Sohio's inclusion of the per barrel differentials as transportation expenses in its crude oil costs. It appears however that this action by Sohio should be examined by the Assistant Administrator for Enforcement within the context of a separate investigation. Only after the conclusion of that proceeding can a determination be reached as to whether Getty or Sohio has any liability under the FEA regulations to refund the amount of the per barrel differentials to consumers. The Assistant Administrator for Enforcement should regard the parties in this case as having standing with respect to any future NOPV. However, the issues presented with respect to the differentials are readily separable from the issues involved in the present Appeal, and in no way alter our determination to affirm the findings in the Remedial Order regarding the scope of Getty's liability for overcharges. Consequently, the question of the differentials will be referred to the Assistant Administrator for Enforcement for separate consideration, and Getty's liability for restitution in this proceeding will be limited to the difference between the F.O.B. value of the foreign crude oil and the ceiling price of the domestic crude oil. The total amount of Getty's overcharges is calculated in the Appendix to this Decision and Order.

In *Shell Oil Co., supra* note 27 at p. 80,690, we held that as a general matter, the particular remedy which a firm is ordered to undertake to correct for previous overcharges should be designed to further the following objectives:

> (1) The benefit of the remedial action should insure wherever possible to the category of purchaser that was overcharged;
>
> (2) Where ultimate consumers were overcharged the manner of restitution should be designed to re-

sult in actual price reductions to the category of consumers;

(3) The refunds or price reductions ordered should be implemented so as to avoid market disruptions;

(4) The firm that violated the FEA Regulations should not be permitted to benefit from the remedial action it undertakes by enhancing its market share or good will.

Id. In the *Shell* Decision, we also noted that in many cases it will not be possible to design remedial action which will advance all of these objectives at the same time. In those instances, the DOE official who issues an Order requiring remedial action must exercise his discretion in determining the manner in which these objectives can best be furthered in the particular case under consideration.

The August 12, 1976 Remedial Order and the Ancillary Order recognized the difficulty of designing an appropriate remedy in this case. For example, with respect to the period prior to the advent of the Entitlements Program, the Remedial Order correctly noted that Sohio should return the overcharges which it passed through to its customers, but also observed that this approach presented serious problems:

> This form of relief, however, cannot now be implemented with any real accuracy. During the time period involved in this case, purchasers have changed; an allocation program assigning 1972 historical customers has been implemented, altered, and now, in part, converted to stand-by status; cost pass-through regulations have been altered, at times restrictively and at others, expansively; products that once were price-controlled now no longer are; and accumulated costs not recovered by firms may now become subject to certain statutory and regulatory limitation pro-

visions. Thus, the measurement of past compensation becomes unwieldy and the need for present compensation becomes most urgent.

For these reasons, FEA concludes that, as Sohio receives the refunds from Getty, Sohio must (of course) treat those refunds as decreases in Sohio's current cost of domestic crude oil, and should reflect that decrease immediately and exclusively in its calculations of prices for those remaining "covered products." Such a decrease ought not be utilized to reduce Sohio's unrecovered increased product costs ("bank") because (1) the bank is subject to limits now which were not in effect at the time Sohio received the domestic crude oil and recovered the costs and (2) the bank is a reflection of costs *not* recovered by Sohio, while the purpose of the refund is to compensate for costs that were recovered by Sohio. *That these refunds be reflected exclusively in the prices of remaining covered products is a necessary aspect of FEA decontrol: no real means exists by which to decrease a price not presently subject to FEA controls* . . . . RO at 45-46 [Emphasis added].

The Remedial Order found that similar problems existed with respect to the period during which the Entitlements Program was in operation:

Since November 1974, FEA has, through the entitlements program, attempted to fix a responsibility for old oil benefits among refiners and to share those benefits with other refiners. Getty's failure to deem the old oil transferred to Sohio as being old oil retained by Getty has deprived the program of a specific amount of old oil in its operation. This has distorted both the relative positions of all refiners in relation to the national old oil supply ratio, and has distorted the calculated value of each entitle-

ment based upon that ratio. The harm brought about by Getty is in this fashion nationwide in its impact to the program and to the participants.

The harm is also immensely complex, and although limited mechanisms exist to effect corrections in the entitlements program, the volume of crude oil and the number of months involved here are somewhat beyond those that such mechanisms may readily accommodate. Getty's obligation, however, is clear. Getty "owes" the nation the exact amount of old oil that it believed it had transferred to Sohio, and it further "owes" the value impact that that oil has upon the price of entitlements.

The device chosen by FEA to reflect Getty's obligation is simple. In addition to commencing to treat the exchange properly,[8] Getty should add, in equal monthly volumes, the amounts of old oil previously erroneously excluded from its calculations. Thus, Getty's future participation in the entitlements program will be somewhat greater than it otherwise would be, but only to the extent that its past participation was improperly diminished. In addition, the prospective inclusion of the old oil already transferred will assure the distribution of Getty's obligations to all other particpants in the entitlements program through future entitlements transactions. . . . RO at 46-47 [footnote omitted].

Sohio has taken the position that any remedial action which requires Getty to refund the overcharges for the pre-November 1974 period directly to Sohio would not be appropriate. Sohio maintains that its conduct was proper at all times and that its customers were not subjected to excessive passthroughs of crude oil costs. Although we do not agree with Sohio's contention, it is nevertheless apparent that it would be difficult at this point in time to identify the particular Sohio customers who were in-

jured by the Getty overcharges during the period prior to November 1974. It is of course theoretically possible for an effort to be undertaken to identify those specific customers and the exact amount by which each such customer was adversely affected by the Getty pricing violation. However, any effort to do so would certainly involve a very significant administrative burden to Sohio, the DOE, as well as the prior customers of Sohio. Despite the extent of the burden, the DOE might well conclude that it must nevertheless be incurred if it were the only possible means through which restitution could be made for a past violation. If, however, an alternative remedy exists which would be generally consistent with the principles discussed in the *Shell* Decision and would at the same time avoid the inordinate administrative burden which might be involved in a particular case if precise refunds must be made to each customer, then that alternative remedy should be adopted.

Similar considerations exist with respect to the violation period from November 1974 through January 1976 when the Entitlements Program was in effect. Theoretically, Getty could be required to acquire additional entitlements based on the amount of its ceiling price violation during that period which would effectuate the restoration of the missing old oil into the cost equalization system. However, as a result of a number of complex factors such as the accumulation of refiners' banks of unrecovered costs, changes in supplier/purchaser relationships, and the fluctuation of prevailing crude oil costs and product price levels which occurred both during and subsequent to the period November 1974 through January 1976, it would entail a very significant expenditure of limited resources by the DOE to even attempt to determine with any degree of precision the scope of the particular economic injuries sustained by each domestic refiner and each of its customers. Moreover, it would be extremely difficult to fashion a remedy that would ensure

that refunds made by Getty through the Entitlements Program would inure to the benefit of particular individual refiners and consumers who were actually harmed by the overcharges. Consequently we have concluded that the Entitlements Program may not provide the best possible method of achieving restitution for the Getty overcharges.

In view of the foregoing discussion, it appears that there are two unique considerations which must be taken into account in designing an appropriate remedy in this case. The scope of the injury is somewhat unusual, since the persons adversely affected by the Getty overcharges cannot be identified by reasonable measures. Not only does the class of persons injured by the Getty violations arguably include every domestic consumer of petroleum products during the period concerned, but any remedial action which might be based on the FEA regulatory program cannot have the intended restitutional effect of compensating the injured parties.

Section 205.195(a) of the DOE Administrative Procedures and Sanctions Regulations with respect to Remedial Order provides in part that in addition to directing refunds to be undertaken, the DOE may require a firm "to take such other actions as the [DOE] determines [are] necessary to eliminate or to compensate for the effects of a violation. . . ." Furthermore, Section 5(b)(5) of the Federal Energy Administration Act, as amended, directs the Administrator of the FEA to "prevent unreasonable profits within the various segments of the energy industry. . . ."[27] In view of the broad scope of the DOE's statutory, and regulatory authority with respect to compliance matters, we have concluded that

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[27] Section 5 of the FEAA sets forth the functions and purposes of the Federal Energy Administration. 15 U.S.C. § 764(b)(5) (1976). As noted above, these functions have been transferred to the DOE.

Getty should be directed to remit the amount of its overcharges plus interest to the United States Treasury. This is the only remedial action which the DOE can require in this case which will prevent the unjust enrichment of Getty, Sohio or any other refiner, and also achieve the agency's objective of compensating the ultimate victims of Getty's unlawful conduct: the public at large.

In view of our determination to require Getty to remit the entire amount of its ceiling price violations during the period October 1973 through January 1976 directly into the Treasury of the United States, we have concluded that the Ancillary Order which was issued to Sohio on August 12, 1976 should be rescinded. Accordingly, Sohio's Appeal of the Ancillary Order (Case No. FEA-1057) should be dismissed.

Having concluded that Getty's violations occurred at the producer level throughout the period covered by the compliance proceeding that culminated in the issuance of the Agust 12, 1976 Remedial Order, and having further determined that it would be inappropriate to utilize the Entitlements Program as the mechanism through which to refund Getty's overcharges to consumers, it is accordingly unnecessary to consider Getty's argument that the FEA's alleged "delay" of more than two years in issuing the Remedial Order has deprived Getty of any opportunity to pass through the cost of entitlements.

VIII. *Conclusion*

Based on the considerations set forth above, we have determined that the Getty-Sohio transactions described in this Decision and Order should be treated as an exchange for purposes of the DOE regulatory program, and that the portion of Getty's Appeal which relates to the exchange issue should be denied.

We have further concluded that during the period October 1973 through January 1976, Getty transferred ap-

proximately 25,000 BPD of predominantly old domestic crude oil to Sohio in exchange for matching barrels of foreign crude oil and that as a result, Getty received consideration for its domestic crude oil which exceeded the ceiling prices determined in accordance with 6 CFR 150.354 and 10 CFR 212.73. The amount of Getty's ceiling price violation during the period covered by this proceeding is calculated in the Appendix to this Decision and Order as the difference between the value of the foreign crude oil which Getty received in the exchange and the applicable ceiling price of the domestic crude oil which Getty transferred to Sohio in exchange for the foreign crude oil. Getty's Appeal of the Ceiling Price Charge specified in the Remedial Order should therefore be denied.

In view of the determination reached with respect to the Ceiling Price Charge, it is unnecessary to address Getty's contentions regarding the Entitlements Charge specified in the Remedial Order, and that portion of the Getty Appeal should also be denied.

Finally, with respect to the remedy specified in the Remedial Order and Ancillary Order, we have concluded that Getty should be required to remit the total amount of its ceiling price violations as calculated in the Appendix, plus interest, to the United States Treasury, and that ordering paragraphs 1 through 4 of the Remedial Order which require Getty to make refunds to Sohio and to acquire additional entitlements should be rescinded. In addition, we have concluded that ordering paragraph 2 of the Ancillary Order which requires Sohio to pass through the refunds which it was to receive from Getty should be rescinded, and that the Appeal which Sohio filed from the Ancillary Order should be dismissed.

In view of the complexity of this proceeding, and the likelihood that Getty will seek judicial review of this Decision and Order, we have determined that the stay set

forth in ordering paragraph 8 of the Remedial Order should be modified to remain in effect for a period of 30 days following the date on which this Decision and Order is issued.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal which the Getty Oil Company filed from the Remedial Order issued to it on August 12, 1976 by the Deputy Assistant Administrator for Compliance of the Federal Energy Administration be and hereby is denied.

(2) Paragraphs (1) through (4) on page 48 of the Remedial Order be and hereby are rescinded, and the following provisions substituted in their place:

(1) Getty shall remit to the United States Treasury the amount previously charged by Getty in excess of the ceiling price for domestic old crude oil sold by Getty to Sohio during the period October 1973 through January 1976. The refund required herein is computed as in the Appendix to this Decision and Order and is calculated to total $84,624,845.

(2) Getty shall pay interest to the United States Treasury on the refunds described in paragraph 1 above, computed in accordance with the following rates: (a) for amounts representing overcharges outstanding prior to July 1, 1975, a rate of 6% per annum; (b) for amounts representing overcharges outstanding after July 1, 1975 and prior to February 1, 1976, a rate of 9% per annum; and (c) for amounts representing overcharges outstanding after February 1, 1976, a rate of 7% per annum.

(3) The provisions of paragraphs (1) and (2) of the Remedial Order as revised and set forth in para-

graph (2) of this Decision and Order be and hereby are stayed, and the stay shall remain in effect for a period of 30 days following the date on which this Decision and Order is issued.

(4) The Ancillary Order which the Deputy Assistant Administrator of the FEA issued to The Standard Oil Company on August 12, 1976 be and hereby is rescinded, and the Appeal which Sohio filed from the Ancillary Order be and hereby is dismissed.

(5) This is a final Order of the Department of Energy of which an aggrieved party may seek judicial review.

/s/ Melvin Goldstein
MELVIN GOLDSTEIN
Acting Director
Office of Administrative Review

Date: Oct. 7, 1977

APPENDIX

Table A

Domestic Crude Oil Sold to Sohio
October 1973-January 1976

	Old Oil Sold by Getty (Barrels)	Price Charged (Per Barrel)
October 1973		
November		
December		
January 1974		
February		
March		
April		
May		
June		
July		
August		
September		
October		
November		
December		
January 1975		
February		
March		
April		
May		
June		
July		
August		
September		
October		
November		
December		
January 1976		

Table B

Foreign Crude Oil Sold to Getty
October 1973-January 1976

	Iranian Light	FEA Representative Transfer Price	Murban	FEA Representative Transfer Price
October 1973		4.26		4.84
November		4.26		4.84
December		4.14		4.74
January 1974		10.49		11.73
February		11.00		11.80
March		10.40		11.90
April		10.48		11.72
May		11.04		11.74
June		10.96		11.81
July		10.49		11.96
August		10.63		11.59
September		10.40		11.73
October		10.44		11.43
November		10.64		11.30
December		10.55		11.36
January 1975		10.68		11.43
February		10.67		10.91
March		10.68		11.00
April		10.60		10.86
May		10.65		10.75
June				
July				
August				
September				
October				
November				
December				
January 1976				

Table C

Ceiling Price Violations by Getty
October 1973-January 1976

	Weighted Average Value per Barrel Received by Getty	Old Crude Oil Ceiling Price	Value Differ-ence	Barrels of Old Oil Sold By Getty	Excess Value Received by Getty
October 1973					
November					
December					
January 1974 /					
February					
March					
April					
May					
June					
July					
August					
September					
October					
November					
December					

January 1975	
February	
March	
April	
May	
June	
July	
August	
September	
October	
November	
December	
January 1976	
	$84,624,845

Attachment B

BEFORE THE
OFFICE OF ADMINISTRATIVE REVIEW
OF THE DEPARTMENT OF ENERGY

Re: Getty Oil Co., Case No. FRA 1230, Decision and Order of October 7, 1977

PETITION FOR PARTIAL RECONSIDERATION

The Air Transport Association of America (ATA), a long-standing party to this proceeding, hereby requests the Department of Energy (DOE) to reconsider and revise certain remedial aspects of its October 7, 1977 Decision and Order. In particular, ATA considers it essential for DOE to establish a concrete mechanism for private parties whose injury DOE has expressly recognized to claim against the overcharge fund which Getty must remit to the trusteeship of the United States Treasury. ATA also believes that DOE must make provision for an award of counsel fees in recognition of ATA's undeniable contribution to the disposition of this proceeding and in light of the substantial commitment of time and expense made by ATA.

Immediate revision of the October 7, 1977 Decision and Order is the *only* means by which the primary goal of FEA compliance procedures, *restitution to injured parties*, can be achieved. Indeed, a failure to revise the October 7, 1977 remedy will be doubly disadvantageous to Getty's victims since it would deny them deserved relief and also create an appellate issue for Getty which would likely result in overturning the remedial provisions of the October 7 Order. While the October 7 remedial provisions could then be reformed to remain within the bounds of FEA's legal authority and regulatory precedent, only Getty would benefit from the consequential delay.

ATA was greatly encouraged by the Office of Administrative Review's (OAR) analysis of Getty's actions. OAR has properly revised the Remedial Order (RO) to find a continuing first sale violation by Getty and a continuing injury to consumers by virtue of the disappearance of substantial quantities of domestic old oil from the domestic cost passthrough system. OAR has also correctly perceived that the introduction of the entitlements program affected the impact area of Getty's violation rather than its nature. Finally, OAR has accurately sensed the inadequacies of the RO's remedial provisions and Ancillary Order. ATA concurs in these determinations and does not seek their reconsideration.

As more fully discussed below, however, OAR's hasty conclusion that its inability to pinpoint the identity of and extent of injury to particular parties *at this time* requires forfeiture to the Treasury of the restitution due these parties is wholly unwarranted. DOE lacks legal authority to effect such a forfeiture but has ample authority to fashion an alternative remedy, consistent with its own prior decisions and judicial precedent in similar consumer class injury situations, permitting individual claimants to establish a right to portions of Getty's obligation. Similarly, DOE has clear authority to award counsel fees from the funds generated by ATA's efforts, thus recognizing ATA's contribution and encouraging aggrieved consumers to participate constructively in future DOE compliance proceedings.

Because of the uniqueness of OAR's remedial action, and because the remedial issues were not specifically argued in the previous hearings in the Getty appeal,* ATA believes that OAR may reconsider these determinations pursuant to 10 C.F.R. § 205.107. Alternatively,

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* It was ATA's understanding that these issues were to be reserved for consideration in the context of the Ancillary Order issued to Sohio.

ATA requests that this petition be treated under Subpart J of 10 C.F.R. § 205 as an application for modification of the October 7, 1977 Decision and Order.** Such modification is clearly required under § 205.135(b)(ii) since the legal precedents to be discussed in this filing demand an amended outcome in this proceeding.

I. The October 7 Remedial Provisions Exceed DOE's Legal Authority And Are Inconsistent With Regulatory Precedent

While the October 7 remedial provisions properly require Getty to disgorge the bulk of the gains obtained by its violation of the first sale regulations,* DOE has made no attempt to open an avenue of restitution to Getty's admittedly injured victims. The absence of effective restitution measures leaves the remedy open to legal challenge and puts it at odds with DOE's own regulatory precedents.

DOE's immediate predecessor, FEA, formally recognized that there was no independent legal basis for

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** Copies of ATA's petition have been served on Getty and Sohio. ATA believes that there are no additional "aggrieved parties" within the meaning of 10 C.F.R. § 205.133(b). Indeed, neither Getty nor Sohio could be considered to be aggrieved by the relief sought by ATA since ATA seeks no increase in Getty's liability and no restoration of the Ancillary Order against Sohio. The party most directly affected by this petition, the U.S. Treasury, is a mere stakeholder and has no direct interest.

* As noted in the Decision and Order (p. 52), DOE has not yet required Getty to disgorge the cash differentials furnished by Sohio. Regardless of Sohio's accounting treatment of these differentials, they constitute consideration to Getty above the first sale ceiling. If these payments were included in Sohio's booking of the Getty oil, Sohio's customers have a right to them. If they were not included, Sohio has been damaged by Getty. Whether Sohio, which continued the exchange voluntarily, would have any right to restitution in these circumstances is an issue which should be addressed only in the unlikely event that Sohio booked the Getty oil only at its foreign market value.

refund orders or other overcharge exactions from those who had violated substantive price control regulations. *Shell Oil Company*, 3 FEA ¶ 80,545 at 80,690 (Jan. 6, 1976). Instead, DOE's remedial authority is incident to its price control authority and refunds and rollbacks are "appropriate and necessary [because] prices . . . which have been collected in the past [thus] are reduced to their statutory maximum." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 400 (1946); see *University of Southern California* v. *Cost of Living Council*, 472 F.2d 1065, 1070 n.7 (T.E.C.A. 1972), *cert. denied*, 410 U.S. 928 (1973). As stated in FEA's Compliance Manual at § 5.500.00: "In *all* cases, the general policy of compliance is that the remedy chosen is that which best *recompenses the identified injured party* and eliminates unjust gain."

Absent an element of restitution, DOE orders like the October 7 order requiring payment to the Treasury can well be argued to be nothing more than heavy fines imposed without regard to statutory procedures or limitations on amount. As once again stated in the FEA Compliance Manual:

> "It is extremely important to distinguish between the *remedy* imposed for a particular violation (e.g. refund, rollback, bank adjustment) and the *penalty* that may be warranted as a result of the violation . . . . [A] penalty is not a substitute for a remedy and should not be considered a 'refund' to the U.S. Treasury on behalf of victims that are not identifiable. *A penalty is a form of punishment which does not directly aid the victim of the violation . . . .*" *Id.* at § 5.700.01; *cf. id.* at § 5.507.00 (emphasis added).

The October 7 Order's effort to fit Getty's payments to the Treasury into the mold of restitution by invoking 10 C.F.R. § 205.195(a) and Section 5(b)(5) of the Federal Energy Administration Act (Order pp. 56-57) is totally

unpersuasive. Similarly, the Order's contention that the "public at large," rather than petroleum consumers, was victimized by Getty's unlawful conduct (Order p. 56) is unfounded and inconsistent with the earlier findings of the October 7 Order.

First, while Section 205.195(a) does contemplate a broad scope of "other actions . . . to eliminate or to compensate for the effects of a violation," these actions are clearly intended to be *in addition to refunds* in particular cases. Section 205.195(a) provides no warrant for failing to remedy the injuries of identifiable victims.

Second, Section 5(b)(5) of the Federal Energy Administration Act provides only policy guidance for the execution of actions otherwise authorized by statute. Indeed, all of the mandates in Section 5(b) can be exercised only "[t]o the extent authorized by subsection (a) . . ." which, in turn, permits such programs "as are appropriate in connection with only those authorities or functions" specifically transferred to DOE by the Federal Energy Administration Act, specifically delegated by the President, or otherwise specifically vested by statute in DOE. Thus, Section 5(b)(5) provides no independent authority for a program of overcharge payments to the Treasury.

Third, the claim that the "public at large" was Getty's victim conflicts with the Order's express finding that:

> "During the period prior to the advent of the Entitlements Program in November 1974, Sohio's customers incurred the added expense which resulted from Getty's overcharges to Sohio and Sohio's passthroughs of the costs of the foreign crude oil under its exchange accounting treatment of the transactions. In November 1974 and subsequent months, all refiners, and to an unknown extent, their customers, absorbed the additional expenses generated by Getty's violation as a result of the crude oil cost

equalization aspect of the Entitlements Program and the refiner cost passthrough regulations." (Order p. 51).

Thus, even assuming that Getty's payments to the Treasury could be considered recompense to the "public at large," such recompense would simply not be directed at the actual victims of Getty's violation.

In short, the remedial provisions of the October 7 Order lack the vital restitution element which would distinguish them from civil penalties and bring them within DOE's legal authority. Equally important, these provisions fail to satisfy the equitable requirements of the Compliance Manual and the first principle of the *Shell* decision that "[t]he benefit of the remedial action should inure wherever possible to the category of purchaser that was overcharged." Finally, by resorting to Treasury payments simply because specific injured parties are numerous and not identifiable by DOE at this time, DOE has failed to take cognizance of its own *Cities Service* precedent, 4 FEA ¶ 80,627 (May 9, 1977), as well as pertinent class action principles in large civil cases which point the way to effective restitution with minimum administrative complexity.

II. Lawful And Workable Restitution Alternatives Are Available to DOE

The two practical problems involved in fashioning needed restitution relief in this proceeding are specific identification of injured parties and determination of the amount of each party's injury. DOE's decision argues that these tasks would "involve a very significant administrative burden to Sohio, the DOE, as well as the prior customers of Sohio," and proposes an "alternative remedy" to refunds to avoid "inordinate administrative burdens." (Order p. 55).

In fact, however, practical judicial solutions to similar problems indicate that the "administrative burdens"

of refund can be simplified by a trust fund approach using the volumetric distribution procedures endorsed in *Cities Service Co.*, 5 FEA ¶ 80,627 (May 9, 1977). Moreover, the level of administrative cost involved in the proceeding must be weighed against the restitution available. Where, as here, the overcharges are massive, a full *pro rata* reduction of refunds for administrative cost would not seriously impair the value of the refund remedy.

A. Judicial Solutions to Widespread Injury Problems Provide a Precedential Basis for Considering Getty's Payments to the Treasury as a Trust Fund Subject to Claims by Injured Parties.

ATA believes that an initial vesting of Getty's overcharge restitution in the Treasury is not inconsistent with restitution relief. DOE should, however, specifically acknowledge that the amount so collected is held in trust and will be distributed to injured parties upon proper certification of their claims. Judicial precedent in multiple injury situations is particularly instructive on this point.

While the courts primarily function to decide disputes between specific litigants, they have, on occasion, been faced with the problem of making fair restitution to a wide class of victims. In those situations, the courts have adopted the technique of creating and distributing a single fund measuring the full damage against which victims may present claims for compensation. There has been some concern over the institutional propriety of using the courts (rather than administration agencies) to resolve such cases,* but there has been general agree-

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* *Cf.* Eisen v. Carlisle & Jacqueline, 52 FRA 253 (S.D.N.Y. 1971), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974). In *Eisen* the Second Circuit held that Rule 23 of the Federal Rules of Civil Procedure did not excuse the traditional judicial procedural requirements or make a "class" a juridical entity capable of seeking recovery on its own behalf, regardless of the specific claims of its

ment that the trust fund remedial technique itself is a fair and reasonable means of providing compensation.

An early case in which such a remedy was devised is *Union Carbide and Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir., *pet. for cert. dismissed*, 371 U.S. 801 (1962)). There, in response to special interrogatories, the jury found that (1) the defendants had fixed the price of vanadium ore in violation of the antitrust laws, (2) this violation injured members of the plaintiff class, and (3) the injury suffered could be calculated reasonably using a formula based upon the pounds of ore sold to defendants by each class member. *Id.* at 587. The court then postponed entering final judgment to allow previously unnamed members of the injured class to present evidence of their volume of sales to a special master who then calculated the damages due each victim using the per-pound formula previously established.

A similar remedial approach was adopted in *Daar* v. *Yellow Cab Co.*, 67 Cal.2d 695, 433 P.2d 732 (1967). There the plaintiff alleged that the defendant taxi company had rigged its meters to illegally overcharge all passengers. The defendant challenged the propriety of a class action, asserting *inter alia* that no effective class relief could be fashioned. The California Supreme Court held that if the gross amount of illegal overcharges could be fairly determined, as alleged, a fund could then be created against which individual class members could present their claims. *Id.*; *see Vasques* v. *Superior Court of San Joaquin Cnty*, 4 Cal.3d 800, 810 (1971). The case reports does not reveal the final remedial method adopted by the trial court on remand. However, in the course of determining that a fair remedial scheme was feasible, the California Supreme Court specifically noted

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members. The Supreme Court, in essence, affirmed that holding. It should be noted, however, that the Second Circuit expressly noted that administrative agencies could conduct such proceedings. 489 F.2d at 1019.

the following proposal of the state government, as *amicus curiae*:

> "the total amount of the overcharge recovered . . . should be deposited with [a] named trustee . . ., subject to an order that class members presenting adequate proof of identity may obtain a refund of overcharges attributable to them. At the end of seven years, the uncollected portion of the deposited funds would be presumed abandoned [and would escheat to the state]. Such a plan would insure that each of the injured parties would recover all of his provable excess payments whenever he establishes his identity and that the defendant would not retain the alleged unjustly acquired benefits." 67 Cal.2d at 810, n.15.

Essentially the same method was later adopted in the massive broad spectrum antibiotics price fixing case. There, many states and smaller political subdivisions had brought suit against several major drug manufacturers. The governmental plaintiffs claimed damages in their own right for drug purchases made through governmentally financed programs. They also pressed claims as representatives of classes of their citizens who had been harmed as individual consumers. Eventually the defendant drug companies offered a settlement of $100 million for all claims.

The problem then presented was how to distribute the damage fund. The solution adopted was to apportion the fund among the governmental plaintiffs on the basis of the hospital beds located in each jurisdiction. The governmental plaintiffs were allowed to claim a portion as their own damages. The remainder of each fund was then held in trust by such governmental plaintiffs, subject to the claims of citizens for a refund. A volumetric formula was established for calculating the refund to be made to a consumer for each dollar expended by him

on the antibiotics in question. After a reasonable claims period, the remaining unclaimed funds escheated to the governmental trustees.

Although this plan was worked out as a settlement, it involved a class action and the Federal Rules of Civil Procedure required that the court approve it. After discussing the proposal in detail, the federal district court concluded that it was fair and reasonable, and this finding was sustained on appeal. *West Virginia* v. *Chas. Pfizer & Co., Inc.*, 314 F. Supp. 710 (S.D.N.Y.) *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). A very similar remedial procedure was adopted and judicially approved in *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 322 F. Supp. 834 (E.D. Pa.), *aff'd*, 453 F.2d 30 (3d Cir. 1971).

This proceeding falls squarely within the line of precedent in which the creation of a trust fund subject to presentation of claims by identifiable victims has been employed. First, the gross amount to be refunded can be, and has been, fixed with reasonable certainty without determining the precise injury suffered by any individual claimant. Second, volumetric principles can be devised which will allow individual claimants who suffered significant injury to receive a fair recovery without causing an impracticable administrative burden. *See* M. Malina, "Fluid Class Recovery as a Consumer Remedy in Antitrust Cases," 47 N.Y.U. L. Rev., 477 (1972). Thus, a trust fund remedial technique is appropriate here, especially in view of DOE's strong commitment to making refunds to identifiable victims whenever possible and the agency's wide discretion to proceed on a case-by-case basis to adopt whatever remedy is necessary to achieve substantial justice.

B. Creation and Distribution of a Remedial Trust Fund is Easily Administrable.

The October 7, 1977 Order already has determined the total number of old oil barrels upon which the excess revenues received by Getty should be premised. (Order Table C). DOE has also established the difference between the lawful ceiling price Getty should have charged and the value of the foreign oil received by Getty as partial consideration for its old oil transfers. (*Id.*) Further, DOE has set in motion a process which will permit Getty's additional liability for cash differentials to be determined. (Order p. 52). Thus, the full amount of the trust fund against which injured parties can lay claim should be determined in short order and paid over to the Treasury.

Basic subdivision of the available trust revenues between Sohio's customers and the greater number of injured parties arising after November 1974 presents no administrative problem. Table C of the Order calculates the overcharge already fixed by month and the cash differentials can simply be added as an additional column. Thus, DOE can readily apportion the available trust fund into pre and post November 1974 working funds for claims administration purposes.

1. Administration of the Pre-November 1, 1974 Fund

Administration of the pre-November 1974 working fund is greatly simplified by the fact that Sohio has pressed no claim of injury based on Getty's overcharges and, indeed, has taken the position that its exchanges with Getty were advantageous to it. (Order p. 26). Thus, the distribution of the pre-November 1974 working fund must be limited to claims presented by Sohio's customers. (See Order p. 51: "During the period prior to . . . November 1974, Sohio's customers incurred the added expense which resulted from Getty's overcharges to Sohio

and Sohio's passthroughs of the costs of the foreign crude oil under its exchange accounting treatment of the transactions."). With this limitation, the problem of administration here becomes equivalent to the problem faced in any case where a refiner has improperly passed through fungible costs to all its customers.

In *Cities Service Co.*, 5 FEA ¶ 80,627 (May 9, 1977), improperly banked crude oil costs were used to increase the selling prices of the full spectrum of covered products. Cities argued that the broad distribution of these fungible costs, and the broad cost allocation discretion permitted by DOE regulations, made it administratively impossible to make restitution to individual customers. DOE rejected those arguments and ordered Cities to distribute refunds to all identifiable customers in an amount proportional to their volumetric share of total purchases from Cities during the period of violation. Sums owing to unidentifiable customers were to be returned to the marketplace by future price reductions. *Id.* at 181, 188-89.

The *Cities Service* decision acknowledged that volumetric restitution might not precisely compensate all injured parties. Indeed, so long as costs are fungible and no particular cost dollar can be traced to any particular price, precise calculations can never be made. However, DOE did conclude that the volumetric approach accomplished substantial justice and was a proper remedy where, as true in this proceeding, "separate computations would be so burdensome as to outweigh the advantages." *Id.*, quoting *Skelly Oil Co.*, 3 FEA ¶ 80,603 at 80,889 (March 19, 1976); *cf. Potomac Gas Co.*, 3 FEA ¶ 80,631 at 81,016 (May 4, 1976).

The litigated *Cities* remedy closely paralleled the restitution principles incorporated in FEA's former Repurification Regulations. (Formerly § 205.243, now rescinded; *see* 50 Fed. Reg. 32734 (1975)). These provided that a refiner which discovered that it was exceeding its profit

margin limit would submit a plan for refunds and prospective price cuts which would reduce its average receipts to permissible levels. If the agency approved the plan, compliance then would purge the violation and hence "repurify" the refiner.

The Repurification Regulations clearly distinguished between identifiable and nonidentifiable customers and also recognized that approximate restitution was permissible. With respect to all "readily identifiable customers" fair refunds were mandatory. (Former § 205.243(1)). After such refunds were made, "remission of the balance of revenues derived from charging prices above base prices [was to be] made to customers of the same class as those charged the prices above base prices . . . ." (Former § 205.243(2)). The regulations also recognized that cost generally should be presumed to have been passed on by distributors and thus limited refunds to "the ultimate consumer." (Former § 205.243(1)).

All DOE precedents thus support the propriety of volumetric refunds to identifiable customers with more speculatively beneficial "alternative remedies" reserved for overcharges volumetrically attributable to unidentifiable consumers. Under these principles, the following simple steps should govern administration of the pre-November 1974 fund.

(a) The full amount of the fund should be established by month under Table C procedures with an appropriate share of administrative expenses* deducted;

(b) Appropriate public notice of claims availability and a claims deadline should be given to all Sohio customers purchasing between November 1973 and November 30, 1974; *

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* These expenses, as discussed *infra*, should include an award of counsel fees to ATA.

* Since DOE regulations require a one month lag between the incurring of costs and their passthrough, the relevant claims period must lag the period of overcharge.

(c) Sohio customers should be advised to make their claims by certifying the volume of Sohio products purchased by product and month between November 1973 and November 1974;

(d) Sohio should be requested, with appropriate reimbursement, to validate volumetric claims and to advise DOE of its full volume of covered product sales by month between November 1973 and November 1974;

(e) Volumetric distribution (with interest) of each month's overcharges should be made to validated claimants; and

(f) Unclaimed funds, which may be substantial, should be attributed to unidentifiable customers and could pass to the Treasury either by escheat or by implementation of the remedy now proposed for all funds.** Alternatively, these funds could be returned to the marketplace, e.g., through the entitlements program as previously recommended by ATA.

ATA recognizes that it is possible that these procedures may result in claims on behalf of resellers and conflicting claims by their customers. Were these circumstances to arise, DOE could require resellers to demonstrate that they were unable to pass through the amounts claim for refund. Given the pervasive scope of controls during the violation period, this demonstration can be made from price control records. Moreover, in the unlikely event of conflicting claims, DOE could proportionalize recovery among resellers and their customers with volumetric allocation of the amounts due customers. Once again, the administrative process would be straightforward and would impose no added burden on Getty.

** Adoption of Treasury payments as a limited means of restitution for unidentifiable customers may be more legally defensible than use of this method to preclude refunds.

2. Administration of the Post-November 1, 1974 Fund

Administration of the post-November 1, 1974 fund could proceed under the same principles as administration of the pre-November 1, 1974 fund. As a preliminary step, however, the monthly distribution of overcharges among all refiners would have to be established to lay a basis for refiner claims and the claims of those purchasing from initially injured refiners.

Table C discloses the amount of old oil removed from the entitlements regime by month because of Getty's violation. Using readily available records, DOE can calculate the net increase in entitlements position which would have accrued to each refiner for each month in which the violation continued and thus establish each refiner's share of the Getty overcharge by month. By this means, a derivative Table C would be calculated for each refiner by month.

Once a derivative Table C has been calculated for each refiner, the process of administration would proceed as set forth for the pre-November 1974 fund with broad public notice of the claims procedure. Where claims are lodged by refiners, they should be required to demonstrate, by product bank calculations, the amount of attributable overcharge not passed through. DOE could then make appropriate distribution between refiners and their customers using volumetric principles to distribute among consumers.

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The October 7, 1977 decision itself states that "[i]f . . . an alternative remedy exists which would be generally consistent with the principles discussed in the *Shell* decision and would at the same time avoid the inordinate administrative burdens which might be involved in a particular case if precise refunds must be made to each customer, then that alternative should be adopted."

(Op. p. 55). ATA believes the trust fund remedy it has spelled out as a modification of the October 7 approach *more* fully meets the *Shell* criteria, including the key legal and practical element of restitution, and must be adopted.

III. DOE's Final Order Should Include An Award of Attorneys Fees

Assuming a proper distribution plan, the Getty Order will dispose of a fund of at least $85 million, and probably over $120 million, which will benefit injured refiners and resellers as well as all petroleum consumers. ATA believes that its participation in this proceeding contributed substantially to that result. Therefore, ATA requests DOE to direct that a portion of the common fund which the October 7 Order will establish be awarded as attorneys' fees and costs. Such an award is supported by well established legal principles and would have the added advantage to DOE of encouraging participation on the merits of future agency compliance proceedings by representatives of injured parties, particularly consumer interests.

A. DOE has Legal Authority to Award Attorneys' Fees and Costs

It long has been settled that where a private litigant assists in the creation or preservation of a fund which will benefit a broad class, fees and costs may be awarded from the fund. *Trustees* v. *Greenough*, 105 U.S. 527 (1882); *Central Railroad and Banking Co.* v. *Pettus*, 113 U.S. 116 (1885). This "common fund" doctrine is based upon principles analogous to quantum meruit—the litigant and his attorneys have conferred a benefit upon all potential recipients of the fund for which the recipients should make a fair payment. The doctrine is applicable equally to primary parties and intervenors who contribute substantially to the proceeding. *Brennan* v.

United States, 45 U.S.L.W. 4546 (3d Cir. 1977); *Ussery* v. *Teamsters Local*, 543 F.2d 369 (D.C. Cir. 1976).

The basic equitable considerations which support the common fund rule are not limited to any particular type of proceeding. Long ago in *Winston* v. *Amos*, 255 U.S. 373, 394 (1921), the Supreme Court observed that where a common benefit is established or preserved through dealings with the executive and legislative branches of government "it is equitable to impose a charge for reimbursement and compensation upon the interests of those beneficiaries who received the benefit, the same as if the result had been achieved through successful litigation in the courts." Thus, in *Honda* v. *Mitchell*, 419 F.2d 324 (D.C. Cir. 1969) (per curiam), attorneys' fees were awarded under the common fund doctrine for participation in administrative proceedings before the Alien Property Board.

DOE's broad authority to formulate effective remedial orders is more than adequate to permit the agency to implement this established rule. DOE has expressly noted the important benefits which flow from intervention in OAR proceedings by representatives of consumer interests. Indeed, it has provided *government funds* to finance such intervention. *Consumers Union of United States*, FSG-0037 (October 7, 1976). In so doing, it relied upon the opinion of the Comptroller General that such payments are proper only where consumer representation is "necessary to represent adequately opposing views . . . ." Comptroller General's Decision B-92288 (Feb. 19, 1976).

If DOE can authorize the expenditure of government funds to provide for the legal services of intervenors, surely its authority also extends to awarding fees from private sources pursuant to firmly established legal and equitable principles which impose no burden whatever on the public fisc. Indeed, such payments appear to be specifically authorized by Section 205.195 of the DOE reg-

ulations which authorizes a remedial order to require "appropriate compensation to third persons for administrative expenses of effectuating appropriate remedies." Very similar language in the mandate of an appellate court was held to authorize a lower court "to provide payment for professional services which aided in making the fund available for distribution" in *Washington Gas and Light Co.* v. *Baker*, 195 F.2d 29, 33 (D.C. Cir. 1951). There the attorneys had created a common fund by participating in litigation which led to a declaration that a rate increase had produced an illegal overcharge which the court directed to be refunded.

B. The Proper Award in This Case

Since the attorneys' fees in a common fund case are based on a theory of quantum meruit, the size of the fund created, i.e., the benefit incurred, is the primary consideration in determiinng the fee to be paid. *See* Hornstein "Legal Therapeutics: The 'Salvage' Factor in Counsel Fee Awards," 69 Harv. L.J. 658 (1956). In one recent case the court approved a fee of 25% of a common fund of $22,175,000, noting that 20-25% is the usual range for such awards. *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 47 F.R.D. 557 (E.D. Pa. 1969). A 25% award, with some adjustments, was also made from a common fund in *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 322 F. Supp. 834 (E.D. Pa.) *aff'd*, 453 F.2d 30 (3d Cir. 1971). *Cf. Arenson* v. *Board of Trade*, 1974 CCH Trade Cases ¶ 74,953 nn.14 & 15 (N.D. Ill. 1974) (collecting cases demonstrating usual fee awards of around 25-30%). Of course, factors such as the novelty and complexity of the issues, the need to provide adequate incentives, the benefits to the public interest, and the skill and expertise of counsel may be considered in adjusting the percentage to be awarded.

The tribunal before which proceedings leading to the establishment of a common fund occurred has great discretion in setting the appropriate percentage of the fund which should be allowed as a fee. This wide discretion exists because of the tribunal's intimate familiarity with the facts and circumstances of the case and its knowledge of the contribution to the result made by the private litigant and its attorneys. For the same reason, there is little point in burdening DOE with a detailed account of ATA's participation in this appeal. The agency's familiarity with the progress of this case, together with confidential attachment A (which details the time expended by ATA's legal staff), provide an adequate basis for assessment of an appropriate fee.

However, ATA would note briefly several special considerations which it believes justifies a generous award. When ATA decided to intervene in the Getty appeal, it knew that it would incur a substantial expense. The issues involved were novel, technical, complex and would require many hours of work by attorneys familiar with the area. ATA's opponent would be a major corporation with huge resources to draw upon and a strong financial incentive to defeat the Remedial Order at all costs. Thus, ATA had to anticipate a long and arduous battle. Furthermore, given the resources of Getty and the complexity of the issues, there was a very substantial risk that the intervention would not be successful and ATA would have nothing at all to show for its pains. These considerations may well explain why only ATA intervened on behalf of consumer interests despite the magnitude of the injury inflicted on all petroleum consumers by Getty's violations and the potential benefits of the proceeding to many major consumer groups.

Despite the risk and expense, ATA has played an active role in the Getty appeal, as DOE is aware. At each step of the proceeding, ATA challenged Getty's argu-

ments and vigorously presented its own analysis. A comparison of ATA's position as summarized at pages 26-30 of the Decision with the original Remedial Order and the final position of the agency as set out at pages 30-57 of the Decision, indicates that ATA's participation contributed substantially to the outcome of the appeal.

Two separate rationales for the fee awards are available under the common fund rule. *Lindy Bros. Builders Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973). First, the litigant, in this case ATA, is entitled to recover its actual expenses, including attorney fees, incurred in the course of the proceeding. *Id.* at 161; see *Trustees* v. *Greenough*, 105 U.S. 527 (1882). Confidential attachment A to this petition details those fees and expenses for which ATA seeks reimbursement.

The second type of award, which is in addition to the refund of expenses, reflects the benefit conferred by the legal services of the attorneys who conductd the litigation. *Lindy Bros., supra* at 165; *see Central Railroad and Banking Co.* v. *Pettus*, 113 U.S. 116 (1885). The theory of this award is that compensation should be made for the attorneys' *de facto* representation of the other beneficiaries of the fund. Of course, any amount awarded in compensation for fees and costs actually incurred should be deducted from this award in order to avoid double recovery.

As confidential attachment A demonstrates, ATA's participation made heavy demands on the time, as well as the skill of ATA's in-house and retained counsel. Despite those heavy demands and the substantial responsibility which the magnitude of the potential recovery imposed upon ATA's counsel, the compensation they received was not adjusted for these circumstances. Thus, this compensation cannot be regarded as fixing the fair value of counsel's services in this case. Instead, it is

relevant "merely to show that claimants were not intermedlers, but were employed by . . . members of the benefited class, and that their services were not intended to be gratuitous." *Winston* v. *Amos*, 255 U.S. 373, 374 (1921).

Based on these and any other relevant considerations, DOE must determine for itself the appropriate portion of the fund to award as fees and costs. As previously noted, the normal range is 20-25% in common fund cases and above 30% in other similar situations. In this case, however, a somewhat lower percentage may be appropriate in the light of the prior efforts of the DOE/FEA compliance staff. Thus, ATA proposes that a total of 10-15% of the final fund established be set aside for counsel fees and costs. This amount should first be applied to offset ATA's direct fees and costs as detailed in attachment A. The remainder should be allocated to the value of the legal services provided by ATA's attorney to all beneficiaries of the funds to be established.

CONCLUSION

As discussed in Parts I and II of this petition, DOE can and should adopt a remedy capable of providing substantial refunds to the identifiable victims of Getty's violation. Such a remedy is administrable and is more consistent with DOE's basic legal policies and authority than is the present Order. As discussed in Part III, DOE also should modify its Order to award attorneys' fees and costs to ATA. Such an award is justified by firmly established legal and equitable principles and would provide a needed incentive for future participation in similar proceedings by injured parties.

Respectfully submitted,

KATHLEEN O. ARGIROPOULOS
Air Transport Association
of America
1709 New York Avenue, N.W.
Washington, D.C. 20006

BERT W. REIN
THOMAS W. KIRBY
1776 K Street, N.W.
Washington, D.C. 20006
Attorneys for ATA

November 7, 1977

Attachment C

[SEAL]

DEPARTMENT OF ENERGY
Washington, D.C. 20461

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mar. 28, 1980

Kathleen O. Argiropoulos, Esq.
Air Transport Association of America
1709 New York Avenue, N.W.
Washington, D.C. 20006 Re: Case No. DMR-0006

Dear Ms. Argiropoulos:

On November 7, 1977, the Air Transport Association filed a Request for Modification of a Decision and Order that the Office of Hearings and Appeals issued to the Getty Oil Company on October 7, 1977. In the October 7 Order, the DOE found that Getty had violated the Mandatory Petroleum Price Regulations and ordered the firm to remit $84,624,845 plus interest to the United States Treasury. In its November 1977 submission, the Air Transport Association requested that the previous order be modified to provide for a mechanism whereby persons could claim a portion of the $84,624,845 amount.

As you are aware, the question of Getty's liability for overcharges under DOE regulations, as set forth in the October 1977 Order, is currently being litigated in court. There is no indication as to when, if ever, Getty will be ordered by a court to comply with the October 1977 Order. Consequently, there appears to be no need at the present time to modify the October 7, 1977 Order as the Air Transport Association has requested. Consequently, we are dismissing the Association's request without prejudice to a refiling at a later date.

We wish to note that since the filing of the Air Transport request in November 1977, Part 205 of the DOE

procedural regulations has been amended to include a new Subpart V entitled "Special Procedures for Distribution of Refunds." Any future request of this nature which the Air Transport Association may wish to file should discuss the applicability of Subpart V procedures to the Getty proceeding.

Accordingly, the Department of Energy orders that the Application for Modification filed by the Air Transport Association on November 7, 1977 is hereby dismissed without prejudice to a resubmission at a later date.

Sincerely,

/s/ Thomas O. Mann
THOMAS O. MANN
Associate Director
Office of Hearings and Appeals

cc: Office of the Special Counsel
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APPENDIX G

On numerous occasions, agency personnel perceived no violation by Getty:

1. On January 27, 1975, Donald Clyman of the Compliance Audit Review Division reported to Avrom Landesman, Assistant Associate Administrator for Compliance and Enforcement, that:

> [T]he decision was made by the [the Compliance Office Audit Review Division] and General Counsel jointly that the pricing transaction was reasonable and permissable [sic] under our regulations and that the consumer benefitted by keeping SOHIO's refinery supplied . . . .

2. On February 14, 1975, Rendel Alldredge of Crude Oil Operations wrote a memorandum, entitled "Catch-22, the Sohio-Getty variation," stating:

> [I]t cannot be justifiably asserted either that the Sohio/Getty Arrangement violates any laws or regulations . . . or that it was entered into with any such intent . . . .

Alldredge recommended that the agency "move quickly to produce adequate definitions and delineations of and between sales and exchanges . . . ."

3. On February 25, 1975, Fred Stuckwisch, Director of the FEA Refinery Audit Review Program, wrote to Doug Robinson of the General Counsel's Office, about the transactions, stating:

> It is the position of this division that as the regulations are currently written, both companies are properly reporting their cost pass through.

4. On March 26, 1975, Robinson replied to Stuckwisch that there were "practical difficulties" in attempting to change the general crude oil pricing rule just to deal with this "unique" situation.

5. On August 8, 1975, Roger Seifert and Chuck Boehl of Regulations Management wrote to Mark N. Silverman who reported that "such transactions at present do not appear to violate the letter of FEA's regulations."

6. On August 22, 1975, Rendel Alldredge wrote to Assistant FEA Administrator Gorman Smith his conviction that the sale of the Kern River net profits interest and "curious asymmetries" in the price and termination provisions of the agreements "would convert the arrangement from an exchange into simultaneous, but individual, sales."

7. On September 30, 1975, Daniel J. Thomas, Regulations Management, wrote to Gerald P. Emmer, Director of the Regulations Division, concerning the transactions. He stated:

> FEA needs to rule on the proper pricing methods that should have been used in these transactions, and to establish procedures that are to be used in the future. . . . Another aspect of this problem is that these transactions can, correctly, be considered exchanges or sales.

8. In October 1975, Chuck Boehl reported to Assistant Administrator Gorman Smith that:

> General Counsel now apparently feels that FEA regulations permit the Getty-Sohio type of exchange and Sohio's method of booking costs. GC proposes to issue a proposed amendment to the regulations to be applied prospectively. . . .
>
> Although the two agreements seem related they are separate and payment is made for the crude in each cases (which would seem to indicate a sale) . . . I am not convinced the Getty-Sohio deal for domestic crude is an exchange.

9. On July 29, 1975, Assistant FEA Administrator Gorman C. Smith stated:

> Someone in Regulation Development should immediately determine the most effective and expeditious way to prevent such occurrences and draft the necessary regulation changes for my routing to Bob Montgomery.

APPENDIX H

The following portions of the administrative record were not disclosed to Getty during the agency proceedings:

1. Tables of Sohio and Getty crude prices
2. October 18, 1976 memorandum from Richard Tedrow, Assistant Director, Office of Exceptions and Appeals, to Avrom Landesman, Assistant General Counsel, Compliance and Enforcement, requesting materials concerning congressional interference in the enforcement proceeding
3. November 4, 1976 memorandum from Lon Smith, Acting Director, Compliance Case Regulation, to Richard Tedrow, attaching materials from the investigative files
4. February 25, 1976 memorandum from Alan Moss, Acting Director, Compliance Case Resolution, to Avrom Landesman, seeking help in drafting the Remedial Order
5. September 30, 1975 memorandum from Daniel Thomas, Regulations Management, to Gerald Emmer, Director, Regulations Division, concerning the proper treatment of foreign/domestic crude oil exchanges
6. The 1976 amendments to the entitlements regulation concerning foreign/domestic exchanges
7. Draft ¶ 5 of those amendments
8. Eighteen allegedly confidential pages from Sohio's response to the Sohio NOPV
9. February 25, 1975 memorandum from Fred Stuckwisch to Doug Robinson, General Counsel, discussing Sohio/Getty "crude oil exchange"

10. Memorandum of Louis Isabella, Supervisory Auditor, to Lon Smith, attaching allegedly confidential information on domestic crude oil volumes underlying Table A, based on invoices in Sohio's offices

11. March 1975 memorandum of Louis Isabella, attaching allegedly confidential description of Sohio's accounting treatment

12. March 26, 1975 from Douglas Robinson, Deputy General Counsel, Compliance and Litigation, to Fred Stuckwisch, Director, RARP, concerning Sohio/Getty "crude oil exchanges"

13. July 24, 1975 memorandum from Robert Kane on the Getty/Sohio transactions

14. July 29, 1975 memorandum from Gorman Smith, Assistant Administrator, to Mark N. Silverman, Associate Assistant Administrator, re drafting the necessary regulatory changes

15. Confidential portions of Sohio's comments deleted from Getty's copy

16. December 27, 1976 comments of Airline Transport Association re Sohio's appeal of the Ancillary Order

17. Sohio's response to the Ancillary Order

18. April 11, 1977 memorandum from Richard Tedrow to Gordon Harvey, Director, Office of Compliance Policy and Planning, re information on Getty's selective enforcement argument

19. Memorandum to the file reflecting oral request to Barton House for written list identifying people involved in the Remedial Order

20. April 12, 1977 memorandum from Scott Lang, Assistant General Counsel, Litigation, to Melvin Goldstein, Director, Office of Exceptions and Appeals, re the recusal order

21. April 14, 1977 memorandum from Barton House, Acting Deputy Administrator, Regulatory Programs, to Melvin Goldstein, re the recusal order

22. April 22, 1977 memorandum of Gordon Harvey to Richard Tedrow, Assistant Director, Office of Exceptions and Appeals, re selective enforcement of regulations

APPENDIX I

The following is a summary of Getty's attempts to obtain discovery and an evidentiary hearing before the agency:

1. *August 7, 1975*: In order to respond to the NOPV, Getty filed a Request for Information under the Freedom of Information Act for, *inter alia*, a copy of the Sohio NOPV, FEA's letter rescinding the Sohio NOPV, and all other documents sent or received by, or on behalf of, the FEA which in any way dealt with or related to the Getty/Sohio crude oil transactions.

2. *August 25, 1975*: Getty responded to the NOPV. Getty denied the allegations of the NOPV and reviewed the separate nature of the transactions. Getty stated that it had no knowledge of Sohio's pass-through for the domestic oil. Getty said that if Sohio had passed through costs related to the foreign transactions in addition to the domestic contract price, it had done so without Getty's knowledge or concurrence.

3. *September 10, 1975*: Getty supplemented its response to the NOPV. Getty reiterated that if Sohio had passed through more than the domestic contract price, it had done so without Getty's knowledge, consent, participation or control. Getty suspected that Sohio had changed its accounting treatment of the transactions. Getty cited Sohio correspondence referring to the foreign transactions as "crude oil purchases."

4. *April 21, 1976*: Getty protested that the agency was frustrating its efforts to learn more about the NOPV and the Sohio NOPV. Getty complained that it had not been informed about the Sohio NOPV or its rescission and that it had been prejudiced by not being invited to comment upon Sohio's response to the Sohio NOPV. It protested the delays in satisfying its FOIA request.

5. *September 22, 1976*: Getty filed discovery requests in aid of its appeal of the Remedial Order. Request Nos. 2, 7 and 8 sought documents prepared or received by the FEA relating to the Remedial Order, the NOPV, Tables A and B, and the Getty/Sohio transactions. Request Nos. 6, 12 and 13 sought documents on Sohio's accounting treatment for the transactions since July 1971. Request No. 11 sought every document relied upon by FEA in calculating the transfer prices used to determine the value of the foreign crude oil on Table B. The cover letter to Getty's discovery gave notice that Getty would make a request for an evidentiary hearing.

6. *October 5, 1976*: Getty appealed the Remedial Order. Getty protested FEA's refusal to release the confidential portions of Sohio's response to the Sohio NOPV in response to Getty's FOIA request. Getty formally requested an evidentiary hearing at which it could "present witnesses, written evidence and oral and written argument" in support of its appeal.

7. Getty submitted sworn affidavit testimony from those of its officers and employees who were responsible for negotiating and performing the foreign and domestic agreements. These affidavits stated: Getty had intended the transactions to be separate purchases and sales at the contract prices; Getty believed that BP and Sohio had intended the same at the time of negotiating the agreements; Getty had no knowledge of and did not participate in any passthrough by Sohio of domestic costs other than the contract price; Getty had no knowledge of Sohio's accounting treatment for the transactions; Getty believed Sohio must have changed its accounting treatment of the transactions; Getty did not know how the agency had derived transfer prices and would require extensive discovery on the subject; the transfer prices did not appear to accurately measure the market value

of the foreign crude oil; and Tables A and B contained inaccurate volume data.

8. *October 7, 1976*: Pursuant to the procedure established at an OHA conference on Getty's appeal, counsel for Getty inspected the agency's investigative files on the Getty/Sohio transactions and paper-clipped documents in those files that were responsive to Getty's discovery. It was arranged that those documents would then be released to Getty by the Compliance Office.

The paper-clipped documents were never released to Getty. Lon Smith of the Compliance Office forwarded the documents to OHA for consideration with the balance of Getty's discovery requests. The paper-clipped documents withheld from Getty included the confidential portions of Sohio's response to the Sohio NOPV (which duplicate the confidential portions of Sohio's comments in the Getty appeal) and calculations by an agency auditor that formed the basis for Table A of the Remedial Order.

9. *October 13, 1976*: Getty submitted its appeal brief. Getty reiterated that it had no knowledge of and did not participate in any Sohio passthrough of more than the contract prices. Getty reiterated that it had no knowledge of Sohio's accounting treatment.

10. *December 17, 1976*: Getty protested that FEA had not responded to its discovery requests. Getty complained that the paper-clipped pages from the investigative files had never been released. Getty protested: "No hearing has been held on the Appeal and no hearing is possible until we receive and study the responses of our interrogatories."

11. *March 18, 1977*: Getty sought reconsideration of OHA's Decision and Order of March 16 denying all discovery as unnecessary. Getty reiterated that discovery was necessary for an adequate defense. Getty again complained about not getting the paper-clipped docu-

ments. Getty reiterated that: "[U]nless and until we have proper discovery, any hearing conducted in respect of our appeal will not be meaningful. . . ."

12. *March 18, 1977*: Getty separately requested that the hearing to be held on its appeal be the fullest possible type of hearing, and include, *inter alia*, the essential elements of notice, oral argument, presentation of witnesses and evidence, cross-examination of adverse witnesses and disclosure of all evidence relied on. Getty requested the issuance of subpoenas to FEA and Sohio officials so that it might cross-examine them. Getty sought the issuance of subpoenas *duces tecum* to these officials which re-requested for the hearing the documents Getty had previously attempted to discover. Getty acknowledged, however, that: "Because we have been denied discovery, [Getty] is not sure how long the hearing may take." Getty stated that one of the purposes of its discovery was to discover the names of witnesses, and because that discovery had been denied it could not presently identify all witnesses that would be called.

13. *March 30, 1977*: OHA convened a status conference to discuss the procedures to be held at the hearing on Getty's appeal. At that conference, Getty again requested that a trial-type evidentiary hearing be held. Getty protested OHA's denial of all discovery. Counsel stated: "[N]ow, in considering the hearing that we want, I want to make it clear that we consider that the type of hearing that we would need would vary, depending on whether we had the information requested in our interrogatories or not."

OHA requested that Getty itemize all the fact issues in the Remedial Order that it disputed, identify what witnesses it would call at an evidentiary hearing, and establish why their testimony could not be presented in written form. Getty responded that it had already identified the fact issues in dispute in its appeal papers.

As an example of a fact issue in dispute, Getty identified the agency's use of transfer prices to value the foreign crude oil. Getty stated that it was entitled to test the information underlying transfer prices, and that it was entitled to the underlying raw data in order to do so. Getty stated that its ability to identify witnesses by name was hampered by the fact that it had been denied all discovery. It stated:

> Having been denied answers to interrogatories, the knowledge of third party witnesses is something that must continue to elude us . . . [T]his list [of factual items] necessarily is going to be more restricted than it would be had we had answers to our [discovery].

14. *April 6, 1977*: Getty submitted its itemization of factual issues to be resolved at an evidentiary hearing. That list did not include issues relating to the Remedial Order because Getty stated:

> On further consideration of . . . the FEA's denial of our discovery requests, it is now obvious to us that the hearing that we initially requested, at best will be of limited usefulness. . . . Having been denied appropriate discovery, we necessarily have no further evidence to submit in response to the first category of factual issues . . . *i.e.*, those issues arising solely from the Remedial Order. . . .

With respect to the disputed fact findings of the Remedial Order, Getty was required to rest on the showing made in its appeal papers. Getty itemized four other factual issues to be considered at the hearing. They involved the issues of impermissible congressional pressure, selective enforcement of the regulations, FEA's interpretation of Section 211.67(g) as originally promulgated, and the intent of the agency in issuing the 1976 clarifying amendments to Section 211.67(g).

15. *April 19, 1977*: OHA convened another conference to discuss the procedures to be followed at the hearing. Getty again protested the denial of discovery. At the conclusion of the conference, Mr. C.J. Head, counsel for Getty, stated: ". . . *independent of the factual hearing or evidentiary hearing that we believe ought to be held we do intend to submit some updating of material. For instance, our appeal was filed in October. There have been developments that I think you should be privy to, just to have a current record. For example, the merger of Skelly Oil into Getty Oil somewhat changes some of the factual things that we presented as a part of our appeal. But those can be done by affidavit. Similarly, there were some things that are in the Sohio affidavits that we dispute and I directed my letter of December 17, 1976 to that issue and said that we wish to defer that and assumed that that was acceptable. We would like to file a short statement on a couple of points in their affidavit. But that again is written and we don't need a hearing on those things.*" (Emphasis added.)

16. *May 16, 1977*: Getty submitted the supplemental affidavits and written argument that it had referred to at the conference. It explicitly stated that:

> Getty Oil does not waive any of its rights in respect of . . . (a) the OEA's denial of most discovery requested by Getty Oil . . . (b) the OEA's denial . . . of an evidentiary hearing in respect of the factual issues raised in Getty Oil's Counsel's letter of April 6, 1977 to the OEA, and the factual issues that could have been raised by Getty Oil had it been afforded the discovery requested . . . Getty Oil specifically reserves its rights to raise all such issues before the FEA or any other person or body, including a court of appropriate jurisdiction.

Getty's affidavits complained that Sohio's comments were replete with self-serving statements about the trans-

actions, they discredited the documents submitted by Sohio, and they protested that the confidential exhibits to the comments had been deleted from Getty's copy and Getty had no idea of their contents.

17. *May 25, 1977*: OHA convened a hearing without any witnesses on Getty's appeal. At that hearing Getty again stated that it was not waiving any of its arguments. Getty stated:

> Had we been permitted discovery, there would have been other significant facts, I believe, that would be before you.

Getty again stated that it did not know how Sohio had accounted for the transaction because it had been denied discovery, and that it did not know how Sohio had assigned values for the foreign crude oil because it had also been denied discovery in this area.

Getty stated that it had not yet had a chance to review the computer summaries of transfer price data that had been issued to it and would have to go back to the FEA to get information to decode the summaries. OHA directed Getty to raise all of its questions concerning the transfer price computer summaries in its written comments instead.

18. *July 2, 1977*: Getty submitted comments on and objections to the transfer price computer summaries. Getty complained that the summaries were inadequate and stated that it required the 701 forms:

> The response does not provide Getty Oil with the assumptions and underlying raw data used by the FEA to derive the transfer prices and values included in tables B and C of the Remedial Order . . . .
>
> As [OHA's April 18 discovery order] points out, in order for Getty Oil to effectively challenge the

transfer price values relied upon by the FEA for its charge of a ceiling price violation, Getty Oil must have access to the data upon which those transfer price values are based. Getty Oil submits that the price reports produced by the FEA constitute a specious attempt to provide Getty Oil with the necessary information. Meaningful discovery has been denied Getty Oil by the FEA's actions and Getty Oil's ability to effectively challenge the basis for the alleged ceiling price violation continues to be curtailed by the very entity alleging the violation.

APPENDIX J

The Economic Stabilization Act of 1970, 12 U.S.C. § 1904 *note*, reads in pertinent part as follows:

§ 207. Administrative procedure

(a) The functions exercised under this title are excluded from the operation of subchapter II of chapter 5, and chapter 7 of title 5, United States Code [subchapter II of chapter 5, and chapter 7 of Title 5], except as to the requirements of sections 552, 553, and 555(e) of title 5, United States Code [sections 552, 553, and 555(e) of Title 5].

* * *

§ 211. Judicial Review

(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code [section 1254 of Title 28]. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provi-

sion of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

12 U.S.C. § 1904 *note* (1976)

APPENDIX K

The Emergency Petroleum Allocation Act of 1975 provides in pertinent part:

> § 754. Administration and enforcement; delegation of authority; civil and criminal penalties
>
> (a)(1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753 (a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

15 U.S.C. § 754(a)(1) (1976)

APPENDIX L

Section 552 of the Administrative Procedure Act reads in pertinent part as follows:

> § 552. Public information; agency rules, opinions, orders, records, and proceedings
>
> (a) Each agency shall make available to the public information as follows:
>
> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
>
> * * *
>
> (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, and examinations;

5 U.S.C. § 552(a)(1)(c) (1976)

APPENDIX M

As promulgated on September 5, 1974, Part 205, "Administrative Procedures and Sanctions," of the regulations of the Federal Energy Administration read in pertinent part as follows:

§ 205.106 FEA evaluation.

(a) *Processing.* (1) The FEA may initiate an investigation of any statement in an appeal and utilize in its evaluation any relevant facts obtained by such investigation. The FEA may solicit and accept submissions from third persons relevant to any appeal provided that the appellant is afforded an opportunity to respond to all third person submissions. In evaluating an appeal, the FEA may consider any other source of information. The FEA on its own initiative may convene a conference or hearing if, in its discretion, it considers that such conference or hearing will advance its evaluation of the appeal.

(2) If the FEA determines that there is insufficient information upon which to base a decision and if, upon request, the necessary additional information is not submitted, the FEA may dismiss the appeal with leave to amend within a specified time. If the failure to supply additional information is repeated or willful, the FEA may dismiss the appeal with prejudice. If the appellant fails to provide the notice required by § 205.104, the FEA may dismiss the appeal without prejudice.

(3) *Failure to satisfy requirements.* (i) If the appellant fails to satisfy the requirements of paragraph (b)(1) of this section, the FEA may issue an order denying the appeal. The order shall state the grounds for the denial and a copy of the order

shall be served upon the appellant and any other person who participated in the proceeding.

(ii) The order denying the appeal shall become a final order of the FEA within 10 days of its service upon the appellant, unless within such 10-day period an amendment to the appeal that corrects the deficiencies identified in the order is filed with the Office of Exceptions and Appeals or the appropriate Regional Office.

(iii) Within 10 days of the filing of such amendment, as provided in paragraph (b) (1) of this section, the FEA shall notify the appellant whether the amendment corrects the specified deficiencies. If the amendment does not correct the deficiencies, that notice shall be an order dismissing the appeal as amended. Such order shall be a final order of the FEA of which appellant may seek judicial review.

(b) *Criteria.* (1) An appeal may be summarily denied if—

(i) It is not filed in a timely manner, unless good cause is shown; or

(ii) It is defective on its face for failure to state, and to present facts and legal argument in support thereof, that the FEA action was erroneous in fact or in law, or that it was arbitrary or capricious.

(2) The FEA may deny any appeal if the appellant does not establish that—

(i) The appeal was filed by a person aggrieved by an FEA action;

(ii) The FEA's action was erroneous in fact or in law; or

(iii) The FEA's action was arbitrary or capricious.

The denial of an appeal shall be a final order of FEA of which the appellant may seek judicial review.

• • •

§ 205.108 Appeal of a remedial order.

The appeal of a remedial order shall be in accordance with the procedures stated in this subpart, *except:*

(a) The appeal must be filed within 10 days of the service of the remedial order; and

(b) If the appeal is of a remedial order that was issued subsequent to a notice of probable violation that relates to an order or interpretation previously issued by the FEA, with respect to which there was an exhaustion of administrative remedies, no issues will be considered on the current appeal that were raised in that prior proceeding.

(c) If an issue raised on an appeal of a remedial order is also being considered in connection with any other FEA proceeding, the FEA may consolidate such issues and consider them in the appellate proceeding for the remedial order.

• • •

§ 205.172 Hearings.

(a) The FEA in its discretion may direct that a hearing be convened, on its own initiative or upon request by a person, when it appears that such hearing will materially advance the proceeding. The determination as to who may attend a hearing convened under this subpart shall be in the discretion of the FEA, but a hearing will usually not be open to the public.

(b) A hearing may only be requested in connection with an application for an exception or an appeal. Such request may be by the applicant, appellant, or any other person who might be aggrieved by the FEA action sought. The request shall be in writing and shall include a specific showing as to why such hearing will materially advance the proceeding. The request shall be addressed to the FEA office that is considering the application for an exception or the appeal.

(c) The FEA will designate an agency official to conduct the hearing, and will specify the time and place for the hearing.

(d) A hearing may only be convened after actual notice of the time, place, and nature of the hearing is provided both to the applicant or appellant and to any other person readily identifiable by the FEA as one who will be aggrieved by the FEA action involved. The notice shall include, as appropriate:

(1) A statement that such person may participate in the hearing; or

(2) A statement that such person may request a separate conference or hearing regarding the application or appeal.

(e) When a hearing is convened in accordance with this section, each person may present views as to the issue or issues involved. Documentary evidence may be presented at the hearing, but will be treated as if submitted in the regular course of the proceedings. A transcript of the hearing will not usually be prepared. However, the FEA in its discretion may have a verbatim transcript prepared.

(f) The official conducting the hearing may administer oaths and affirmations, rule on the presentation of information, receive relevant informa-

tion, dispose of procedural requests, determine the format of the hearing, and otherwise regulate the course of the hearing.

(g) Because a hearing is solely for the exchange of views incident to a proceeding, there will be no formal reports or findings unless the FEA in its discretion determines that such would be advisable.

6 C.F.R. § 205 (1977), 39 Fed. Reg. 32,262 (Sept. 5, 1974)

APPENDIX N

On September 2, 1975, § 205.196(a), "Remedies," of the regulations of the Federal Energy Administration was amended, with the accompanying explanation, as follows:

Remedies

The Federal Energy Administration hereby amends, effective immediately, § 205.195 of Chapter II, Title 10, Code of Federal Regulations with respect to remedies which may be incorporated in a remedial order, a remedial order for immediate compliance, an order of disallowance or a consent order. The purpose of this amendment is to provide a clarification, in the form of specific examples, of the exercise of the authority already contained in § 205.195.

Section 205.195 presently permits the FEA, among other things, to order a firm to refund amounts paid to such firm that are in excess of the amount permitted under Part 212, or to "take such other action as the FEA determines is necessary to eliminate or to compensate for the effects of a violation or any cost disallowance pursuant to §§ 212.83 or 212.84."

Currently, and pursuant to § 205.195, FEA practice is to order firms to refund the amount of overcharges to their immediate customers. The amendment to the regulation clarifies the FEA's authority to order refunds not only to a firm's immediate customers, but to the ultimate customers who have purchased the covered product, subject to the overcharges, from a middle level distributor of the firm's products. In addition, the amendment clarifies the FEA's authority, in cases where it orders refunds to wholesalers and other middle level distributors, to require that those wholesalers and distributors pass

through the refund amount to their purchasers of the covered products which were subject to the overcharge. Finally, the amendment clarifies the FEA's authority to require, as part of a rollback or refund, that the violator include appropriate interest and compensation to downstream distributors for the administrative expenses of passing through refunds to the ultimate victims of an overcharge.

The principal aim of these amendments is to make it clear that the FEA can and will continue to provide meaningful relief from the effects of price overcharges, even if price controls should expire. To allow the FEA to carry out its enforcement responsibilities effectively, it is necessary to utilize appropriate means to insure that refunds are channeled directly to the ultimate consumers who, in the end, bear the brunt of price overcharges. As an illustration, during the period of price controls, refunds by a refiner to a reseller have been treated by the FEA in some cases as a downward adjustment of the reseller's cost of product. The reseller's customers (*i.e.*, the refiner's ultimate customers) benefit from the refund because the reseller is often compelled by the price regulations to adjust his own prices accordingly.

The termination of price controls will eliminate this use of price controls as one tool in assuring that the ultimate victims of an overcharge receive to the extent possible the benefits of a refund or rollback ordered by the FEA. However, under section 4(g)(1) and section 5 of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), as amended, the FEA has authority to achieve appropriate remedies of price and allocation violations even after the expiration of the EPAA. In order to accomplish appropriate remedies after controls have expired, the FEA intends, as it has in the past, to require by

order whatever action is necessary on the part of offenders and downstream resellers to assure, to the extent possible, that refunds and rollbacks flow to those persons who were the victims of the overcharge. Thus, section 205.195 is being amended to clarify the FEA's authority to require, for example, that refunds be paid directly to ultimate consumers, that the recipients of refunds pass through such refunds to their customers, and that offenders and their intermediate customers hold their prices at designated levels until such time as a particular violation has been fully remedied.

Because of the expiration on August 31, 1975 of authority to promulgate regulations pursuant to section 4(a) of the EPAA, strict compliance with the provisions of section 7(i)(1)(B) of the Federal Energy Administration Act of 1974 (Pub. L. 93-275), regarding notice and opportunity to comment would not be possible prior to such expiration, and therefore compliance could result in serious injury to the public welfare. Thus, the FEA is hereby waiving notice and public comment.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended by Pub. L. 93-511; Federal Energy Administration Act of 1974, Pub. L. 93-275; E.O. 11790, 39 FR 23185.)

In consideration of the foregoing, Part 205 of Chapter II, Title 10 of the Code of Federal Regulations is amended, effective immediately, as set forth below.

Issued in Washington, D.C., August 28, 1975.

DAVID G. WILSON,
Acting General Counsel,
Federal Energy Administration.

Section 205.195 is revised to read as follows:

§ 205.195 Remedies.

(a) A remedial order, a remedial order for immediate compliance, an order of disallowance, or a consent order may require the person to whom it is directed to roll back prices, to make refunds equal to the amount (plus interest) charged in excess of those amounts permitted under Part 212, to make appropriate compensation to third persons for administrative expenses of effectuating appropriate remedies, and to take such other actions as the FEA determines is necessary to eliminate or to compensate for the effects of a violation or any cost disallowance pursuant to §§ 212.83 or 212.84. Such action may include a direction to the person to whom the order is issued to make refunds directly to any purchasers of the products involved, notwithstanding that those purchasers obtained such products from an intermediate distributor of such person's products, and may require as part of the remedy that the person to whom the order is issued maintain his prices at certain designated levels, notwithstanding the presence or absence of other regulatory controls on such person's prices.

(b) The FEA may, when it deems it appropriate, issue orders ancillary to a remedial order, remedial order for immediate compliance, order of disallowance, or consent order requiring that a direct or indirect recipient of a refund pass through, by such means as the FEA deems appropriate, including those described in paragraph (a) of this section, all or a portion of the refund, on a pro rata basis, to those customers of the recipient who were adversely affected by the initial overcharge.

10 C.F.R. § 205.195(a) (1977), 40 Fed. Reg. 40,141 (Sept. 2, 1975)

APPENDIX O

Part 212, "Mandatory Petroleum Price Regulations," of the regulations of the Federal Energy Office, predecessor to the Department of Energy, read in pertinent part as follows:

§ 212.31 Definitions

. . .

"Price" means any consideration for the sale or lease of any property or services and includes rent, commissions, dues, fees, margins, rates, charges, tariffs, fares, or premiums, regardless of form.

"Price adjustment" means the weighted average of all price increases.

. . .

§ 212.73 Ceiling price rule.

(a) *Rule.* Except as provided in section 212.74, no producer may charge a price higher than the ceiling price for the first sale of domestic crude petroleum.

10 C.F.R. § 212 (1977), 39 Fed. Reg. 1924 (Jan. 15, 1974)

APPENDIX P

On December 21, 1978, interim amendments were adopted to Part 212, "Mandatory Petroleum Price Regulations," of the regulations of the Department of Energy to add the following definition of "exchange":

> For purposes of these amendments, the term "exchange" means a transaction involving the reciprocal transfer of crude oil or products (but not crude oil for products) between two firms. An exchange frequently includes a cash or crude oil or product volume payment which (1) equalizes the values of the crude oil or products transferred, (2) reimburses a firm for costs incurred pursuant to an exchange, or (3) a combination of these two. The term exchange includes a "matching purchase and sale" transaction. For purposes of these regulations, a "matching purchase and sale" transaction is one in which two firms agree to sell crude oil to each other or product to each other (but not crude oil for products), and in which the volumes transferred and the cash paid and received by each firm are dependent on the value of the crude oil or products received.

43 Fed. Reg. 59,810 (Dec. 21, 1978)

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No. 84-730 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1984

GETTY OIL CO., PETITIONER

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner challenges the findings below that it violated the now-repealed petroleum price control regulations, contending that the Department of Energy gave it an inadequate opportunity to raise evidentiary issues; that the Department lacked the authority to assess prejudgment interest; and that the Department mischaracterized the nature of petitioner's petroleum transactions.

1. In May 1973, petitioner and Standard Oil of Ohio (Sohio) entered into an exchange agreement that was to run until January 1, 1977. Under the terms of the agreement, petitioner agreed to sell Sohio 25,000 barrels per day of domestic crude oil, while Sohio sold petitioner 25,000 gallons per day of foreign crude oil. The price that petitioner would pay for the foreign oil was set at the amount that Sohio would pay for the domestic crude, less the difference between the May 1973 prices of domestic and foreign oil.

Pet. App. 3a.[1] The effect of the agreement —which provided both parties with oil at the place where it was needed — was a barrel-for-barrel exchange of foreign for domestic oil with a cash differential paid to petitioner.

In late 1973, price controls were imposed on the sale of domestic crude oil. See 10 C.F.R. Pt. 212 (1977).[2] The regulations in effect during the period relevant to this case established a maximum ceiling price for domestic crude oil (10 C.F.R. 212.73(a) (1977) (reprinted at Pet. App. 183a)), and defined "price" to include "any consideration for the sale of any property or services * * * regardless of form." 10 C.F.R. 212.31 (1977) (reprinted at Pet. App. 183a). With the advent of controls, the price that petitioner could charge for its domestic oil was regulated. The price of foreign oil was not controlled, however, and the value of such oil increased dramatically during the life of the agreement between petitioner and Sohio (see Pet. App. 4a, 16a). As a result, it is undisputed that petitioner sold the foreign oil that it received from Sohio in exchange for its domestic oil for a price that far exceeded the amount that lawfully could have been charged for that domestic oil (*id.* at 4a).

On August 1, 1975, the Department[3] issued a notice of probable violation to petitioner, indicating that it had

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[1]While the agreement was embodied in two documents, the contracts " 'were coextensive in duration, expressly related to each other in respect to price, volume, term and termination, negotiated at the same meeting and executed on the same date' " (Pet. App. 3a-4a, quoting *Getty Oil Co.* v. *Department of Energy*, 569 F. Supp. 1204, 1209 (D. Del. 1983)). The district court in this case accordingly found that petitioner and Sohio "would not have executed one contract without concurrently executing the other" (Pet. App. 4a). See *id.* at 5a.

[2]On January 28, 1981, price controls were removed from crude oil and refined petroleum products. Exec. Order 12287, 46 Fed. Reg. 9909. The Emergency Petroleum Allocation Act of 1973 itself expired on September 30, 1981. 15 U.S.C. 760[illegible]

[3]The term "Department" is used to refer to the Department of Energy and its predecessors in the administration of the petroleum price control program, the Federal Energy Administration and the Federal Energy Office.

reason to believe that petitioner's agreement with Sohio violated the price control regulations. On August 12, 1976, after considering petitioner's response, the Department issued a remedial order charging petitioner with violations of the regulations. See Pet. App. 17a. Following extended proceedings and a hearing, petitioner's appeal of this order was rejected by the Department's Office of Hearings and Appeals (see *id.* at 17a-18a). Petitioner was ordered to repay some $84 million in overcharges, including prejudgment interest (*id.* at 126a).

The Department's decision was upheld by the United States District Court for the District of Delaware, which, after a recomputation of the overcharges, directed petitioner to pay just over $133 million (Pet. App. 11a-50a). The district court included prejudgment interest in this award, noting that "the amount owed is measured by the amount by which the wrongdoer is unjustly enriched" (*id.* at 39a), and finding that the amount of the claimed overcharges in this case was readily ascertainable (*id.* at 45a-50a). This decision in turn was affirmed by the Temporary Emergency Court of Appeals. That court rejected a number of evidentiary and procedural arguments raised by petitioner, noting that petitioner itself had conceded that no material facts were in dispute (*id.* at 7a-8a). The court of appeals also upheld the Department's conclusion that the transfer of Sohio's foreign crude amounted to "consideration" for petitioner's domestic oil, because "[i]n a bilateral contract, which exists here, the promise by one party is the consideration for the promise by the other party" (*id.* at 6a). Finally, the court of appeals endorsed the district court's holding that petitioner was liable for prejudgment interest (*id.* at 10a).

2. Petitioner has alleged a number of procedural and evidentiary flaws in the administrative proceedings in this case: petitioner principally contends that the Department

relied on ex parte evidence and improperly denied petitioner discovery, cross-examination rights, and an evidentiary hearing. Pet. 12-18. These contentions are beside the point, however, because there simply were no factual issues to be resolved below. As the district court noted, "[t]he liability issues are legal ones: What is the substance of the contractual arrangements which the parties entered and what should the consequences be given the congressional intent behind the Mandatory Petroleum Pricing Program?" Pet. App. 35a. Indeed, petitioner itself withdrew its request for a hearing before the Department, and it was unable to point to any disputed factual issues before the Department (see *id.* at 34a), the district court (*ibid.*), or the court of appeals (*id.* at 7a-8a).[4] Petitioner's procedural contentions therefore lack substance.[5]

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[4]Petitioner suggests that the nature of Sohio's intent in entering into its agreement with petitioner is a factual issue that should be explored (Pet. 7, 15), asserting that Sohio's "intent is now admitted to be relevant" (*id.* at 15). This contention plainly is incorrect. As the district court observed, "there is no dispute here about what [petitioner] and Sohio agreed to; there is no ambiguity in the language of the contract which needs to be clarified by parol[] evidence. * * * The subjective intent of Sohio simply does not assist in resolving [the issues in the case] and it is apparent from the decision of [the Department's Office of Hearings and Appeals] that the result would have been no different * * * even if Sohio had reported on and accounted for the transaction in a ma[nn]er contrary to the position which it took in this proceeding." Pet. App. 35a.

[5]Even on their own terms, petitioner's allegations of procedural infirmity are insupportable. The district court found that there were no material omissions from the administrative record, so that the Department's decision was not affected by extra-record evidence (Pet. App. 39a-42a). In any event, Congress specifically exempted the Department's administration of the petroleum price control program from most of the requirements of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*). See Section 207(a) of the Economic Stabilization Act of 1970, Pub. L. No. 92-210, 85 Stat. 747. Petitioner's arguments, which principally rely on cases interpreting the requirements of the Administrative Procedure Act (see cases cited at Pet. 12-17), therefore would have no application in this case even were there factual issues in dispute.

Petitioner's challenge to the award of prejudgment interest is similarly without merit. Despite petitioner's argument to the contrary (Pet. 18), the regulation in effect during the administrative proceedings below authorized the Department to remedy overcharges by ordering repayment *and* by "tak[ing] such other actions as the [Department] determines [are] necessary to eliminate or to compensate for the effects of a violation." 10 C.F.R. 205.195(a) (1977). Because this remedy is restitutionary in nature (see *Citronelle-Mobile Gathering, Inc.* v. *Edwards*, 669 F.2d 717, 722 (Temp. Emer. Ct. App.), cert. denied, 459 U.S. 877 (1982)), it necessarily authorizes the award of interest; as the district court noted, "the amount by which the wrongdoer is unjustly enriched * * * includes the value of the beneficial use of the money prior to disgorgement" (Pet. App. 39a). See *Bonray Oil Co.* v. *Department of Energy*, 472 F. Supp. 899 (W.D. Okla. 1978), aff'd, 601 F.2d 1191 (Temp. Emer. Ct. App. 1979).[6] Petitioner's further contention — that the award of interest was inappropriate because the amount of damages claimed is uncertain (Pet. 19) — plainly is incorrect: even if the case with which the damages may be calculated otherwise were relevant, here both the volume and market value of the foreign crude acquired by petitioner is readily ascertainable. See Pet. App. 45a-46a.

Finally, petitioner is incorrect in asserting (Pet. 19-26) that the Department held it liable by retroactively applying 10 C.F.R. 212.82 (1979) (see 43 Fed. Reg. 59820 (1978)), which defines certain exchange transactions for purposes not relevant here. In fact, petitioner was found under 10 C.F.R. 212.73(a) (1977) to have violated the price control regulations by receiving valuable foreign crude as "consideration" for its domestic oil. See Pet. App. 53a. In reviewing

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[6]Because the Department's power to order the payment of prejudgment interest derives from its statutory authority to order restitution, the validity of subsequent amendments to 10 C.F.R. 205.195 (1977) — which are challenged by petitioner (Pet. 18) — is simply beside the point.

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this decision, both courts below found that petitioner's arrangement with Sohio amounted to a single unified transaction (*id.* at 6a-7a, 19a-20a), with "Sohio's foreign crude fit[ting] comfortably within the common law concept of consideration" (*id.* at 21a; see *id.* at 6a-7a). Given the Temporary Emergency Court of Appeals' "intimate[] familiar[ity] with the intricacies of federal energy regulation" (*Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982)), these conclusions —which properly looked to the substance rather than to the form of the Sohio transaction (see *Tenneco Oil Co.* v. *FEA*, 613 F.2d 298, 302 (Temp. Emer. Ct. App. 1979); *Mobil Oil Corp.* v. *FPC*, 463 F.2d 256 (D.C. Cir. 1971), cert. denied, 406 U.S. 976 (1972)) — do not warrant further review.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Chief Counsel

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JANUARY 1985

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[7]Petitioner's similar contention that "the time period of alleged price violation was enlarged by 15 months after [petitioner's] opportunity to respond had expired" (Pet. 15-16) also is without merit. The August 1975 notice of violation was open-ended, alleging violations for the period "between October 1973 and the current time" (see Pet. App. 17a). In any event, petitioner had notice of and in fact responded to the Department's theory of the case, which did not vary from one period to another. The court of appeals therefore concluded that petitioner "was not prejudiced in the least by the addition of the later time period" (*id.* at 9a-10a).

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No. 84-730

IN THE

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OCTOBER TERM, 1984

GETTY OIL COMPANY,
Petitioner

v.

DEPARTMENT OF ENERGY, *et al.*,

AND

UNITED STATES OF AMERICA,
Respondents

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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PETITIONER'S REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION

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Getty Oil Company's parent company and its non-wholly-owned subsidiaries and affiliates have been listed in the Petition for a Writ of Certiorari at ii.

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PETITIONER'S REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION

Nowhere does Respondents' untimely[1] memorandum deny the numerous conflicts with other circuits that TECA created by its decision below. Nowhere does it deny that TECA has embarked upon a course which is at odds with the rulings of this Court and the other circuits. Indeed, TECA is more at odds with the other circuits than is the Ninth Circuit, which has received considerable scrutiny

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[1] Although having been granted two extensions of time, Respondents' six-page memorandum was not filed within time, nor was any further leave sought or granted.

by this Court. TECA, far from ending its work, has a large docket extending indefinitely.[2] Its activities should not, therefore, continue unreviewed.

When Congress passed the Department of Energy Organization Act in 1977, it expressed the gravest concern about the lack of due process at the agency.[3] This case, like many others, arose prior to that time. Yet this Court has never reviewed what the agency has done either to private parties or to the principles of Constitutional or administrative law.

Instead of addressing these issues, or the legal principles behind them, the Respondents' memorandum is based upon demonstrable misstatements of fact:

1. Respondent at page 4 seeks to avoid the issue of the denial of due process by asserting that Getty "withdrew" its request for a hearing before the Department of Energy. The transcript discloses, however, that Getty waived nothing more than a hearing on certain collateral issues.[4] Getty expressly reserved its right to a hearing

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[2] *See* N.Y. Times, November 5, 1984, at B10, col. 4.

[3] Senator Jacob Javits, the author and Senate sponsor of the bill ultimately approved, stated that the agency's procedures fall "short of the due process safeguards and separation of functions requirements included in all other permanent regulatory schemes." 123 Cong. Rec. 15281 (1977). Representative Bob Eckhardt, the House sponsor, voiced the concern that under the Administration's minimal procedures, there was no way that "a person ordered to comply with a rule or regulation by a remedial order could get a hearing before the agency." *Id.* at 17402.

[4] Mr. C.J. Head, counsel for Getty, stated:

> [I]ndependent of the factual hearing or evidentiary hearing that we believe ought to be held we do intend to submit some updating of material. For instance, our appeal was filed in October. There have been developments that I think you should be privy to, just to have a current record. For example, the merger of Skelly Oil into Getty Oil somewhat changes some of the factual things that we presented as a part of our appeal. But those can be done by affidavit. Similarly, there were some

on issues of material fact as to which there was, and as to which there remains, a genuine dispute.[5]

2. Respondents, also at page 4, surprisingly claim that Getty was unable to point to any disputed issues of fact before the DOE, the District Court, or TECA. That is untrue as to all three. Before the agency, Getty designated numerous disputed issues of fact, including Sohio's intent, prices, volumes, and accounting practices. Getty's attempts to obtain discovery and a hearing as to these and other disputed issues were summarized for this Court at Petitioner's Appendix I. In the District Court, Getty raised those same issues. (District Court Brief at pp. 164-66.) Before TECA they were raised yet again. (TECA Brief at p. 7 and Appendix C thereto.) In light of this, it is astonishing that the Court would be told that no such issues had ever been raised.

3. Respondents state at page 4, note 5 of their memorandum that "[t]he district court found that there were no material omissions from the administrative record, so that the Department's decision was not affected by extra-record evidence." Respondents are engaging in sleight of hand. The District Court's conclusion that the remaining gaps in the administrative record were not material was made *after* the DOE had supplemented the District Court record with twenty-two documents (listed in Petitioner's Appendix H) that had been kept *secret* from Getty at the agency level. Thus, the District Court's

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> things that are in the Sohio affidavits that we dispute and I directed my letter of December 17, 1976 to that issue and said that we wish to defer that and assumed that that was acceptable. We would like to file a short statement on a couple of points in their affidavit. But that again is written and we don't need a hearing on those things.

(*See* TECA brief at 12a, quoting transcript of conference convened by the Office of Hearings and Appeals on April 19, 1977.)

[5] Getty sought such a hearing on at least six different occasions. (*See* Pet. App. I.)

findings do not in any way negate the fact that the agency relied upon secret *ex parte* material.

4. With respect to the 15-month extension of liability without notice to Getty, Respondents state at page 6, note 7 that the notice of violation was open-ended between October 1973 and the current time. That statement misleads this Court as well. The alleged price violation charged by the DOE ended in October 1974. What was alleged for the subsequent period was an entitlements violation (Pet. at 7), which is factually and legally entirely different. Thus, Getty had no knowledge that it was charged with any price violation for any period after October 1974 (thereby doubling its liability) until its opportunity to respond had expired. It was quite wrong for the Respondents to have suggested otherwise.

5. With respect to prejudgment interest, Respondents assert at page 5 that the DOE order and the District Court order were "restitutionary". In fact neither provided for any payment to overcharged parties, but instead to the U.S. Treasury.

6. As to the retroactive application of yet-to-be-developed rules, Respondents state at page 2 that the effect of "the agreement" was a "barrel-for-barrel exchange . . . with a cash differential paid to petitioner." There was in fact not "an" agreement, but three separate agreements. Each sale was separately billed and paid for in full and no "cash differential" was ever paid. (Pet. at 3-4.) Neither TECA nor the District Court accepted the DOE's conclusion that the transactions were an exchange.

7. Respondents at page 2 make the misleading statement that "it is undisputed that [Getty] sold the foreign oil . . . received from Sohio . . . for a price that far exceeded the amount that lawfully could have been charged for that domestic oil." The prices at which Getty resold the foreign oil in Japan during 1974, 1975, and 1976 are not part of the record. Those transactions are not even

the ones as to which Getty has been charged with any violation.[6] Nor was that oil, which never entered the United States, ever subject to the DOE's jurisdiction.

8. Respondents maintain at page 4, note 4 that Sohio's intent is irrelevant to the determination of the nature of the agreements with Getty. Yet, in its Opposition Brief to the District Court, DOE admitted that consideration "depends upon the intent of the parties", thus acknowledging that Sohio's intent was indeed relevant. (Pet. at 22.) The District Court erred, however, in holding, perhaps for the first time anywhere, that intent is not relevant to what constitutes consideration.

9. Respondents at pages 5-6 deny that DOE retroactively applied an exchange rule that it would not formally adopt until 1978. In fact, DOE applied the provisions of this rule in everything but name. As recounted in Appendix G to the Petition, DOE personnel recognized on numerous occasions that Getty had not violated any existing regulation, and that new regulations would be needed if transactions such as those between Getty and Sohio were to be barred in the future. The appropriate rulemaking did not in fact occur until 1978. Yet, the Decision and Order in this case applied the very substance of the yet to be adopted rule in treating matching purchases and sales not as sales, but instead as exchanges.

With respect to prejudgment interest, Respondents rely at page 5 on § 205.195(a) of DOE's regulations and at note 6, also on page 5, on DOE's statutory authority. Yet, the statutes make no provision for prejudgment interest and the only regulation providing for it was adopted in violation of applicable rulemaking requirements. Respondents make no claim otherwise. It is hardly the law that invalid regulations are somehow cured by underlying statutes.

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[6] Getty was charged with a violation on its sale of domestic crude on the theory that the value of the foreign oil purchased became part of the price of the domestic oil sold by Getty.

Nor do Respondents dispute that evidence which could not be tested cannot, as a matter of law, be substantial for purposes of substantial evidence review.

Most critically, Respondents fail to rebut any of Getty's arguments concerning the denial of due process of law. Respondents at page 4, note 5 mischaracterize these arguments as being based on the Administrative Procedure Act, and blithely maintain that the DOE is exempt from "most of the requirements" of the Act.[7] Respondents' statements serve only to divert this Court's attention from the true issue at hand. This is not an Administrative Procedure Act case. Rather, it is a case that raises the fundamental principles of due process applicable to all Americans, whether or not they find themselves before an administrative agency. Getty's liability has been predicated on secret evidence, in a proceeding which permitted Getty neither discovery nor cross-examination, and which was governed by only minimal rules of procedure. There were no rules of evidence. There was no independent finder of fact. Getty not only bore the burden of proving that it had not violated any applicable regulation, it also was presented with a change in the DOE's theory of liability once Getty's opportunity to respond had expired. The due process considerations raised by such practices cannot be explained away by the irrelevant contention that DOE is exempt from portions of the Administrative Procedure Act. Nor should those due process issues go unreviewed by this Court.

As made clear recently in the New York Times, there is little that is "temporary" about the Temporary Emergency Court of Appeals. TECA has been in existence for thirteen years. In addition to the thirty-nine cases now on TECA's docket, 710 cases, involving billions of dollars, remain before the DOE's Office of Hearings and Ap-

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[7] Getty has argued only that the DOE is subject to Section 552(a)(1)(C) of the Act, a fact which is indisputable. (*See* Pet. at 13, note 6.)

peals.[8] Many, if not most, of these cases will eventually come before TECA. Under such circumstances, it is imperative that this Court subject the decisions of TECA to the same level of scrutiny accorded other circuits. The alternative is a proliferation of the conflicts with other circuits caused by TECA's decisions, and the further erosion of fundamental notions of fairness and due process that TECA's decision in the present case represents.

Respectfully submitted,

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February 4, 1985

[8] New York Times, *supra* note 2.